EDITOR'S NOTE

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also:
84-1999
84-1656
85-1085

Title: Paul E. Johnson, Petitioner
v.
Transportation Agency, Santa Clara County, California, et al.

Court: United States Court of Appeals for the Ninth Circuit

Counsel for petitioner: Brooks, Constance E.

Counsel for respondent: Rosenfeld, David A., Woodside, Steven

ry	Date	Note	Proceedings and Orders
	Nov 21 1985		Application for extension of time to file petition and order granting same until January 3, 1986 (Rehnquist, November 25, 1985).
	Dec 31 1985	G	Petition for writ of certiorari filed.
	Feb 5 1986		DISTRIBUTED. February 21, 1986
	Feb 3 1986		Brief of respondents Transportation Agency in opposition filed.
	Mar 6 1986		Reply brief of petitioner Paul E. Johnson filed.
	Jun 23 1986		REDISTRIBUTED. June 26, 1986
	Jun 27 1986		REDISTRIBUTED. July 2, 1986
	Jul 7 1986		Petition GRANTED.
			**********
	Jul 28 1986		Record filed.
	Jul 28 1986		Certified copy of original record and proceedings, 4 volumes, received.
	Aug 15 1986		Brief amicus curiae of Pacific Legal Foundation, et al. filed.
	Aug 21 1986		Brief amicus curiae of United States filed.
	Aug 21 1986		Joint appendix filed.
	Aug 21 1986		Brief of petitioner Paul E. Johnson filed.
	Aug 21 1986		Brief amicus curiae of Mid-Atlantic Legal Foundation filed.
	Sep 3 1986		SET FOR ARGUMENT. Wednesday, November 12, 1986. (2nd case) (1 hour)
	Sep 24 1986		Order extending time to file brief on the merits of respondent Service Employees International Union Local 715 until 3:00 P.M. on October 3, 1986. This extension applies to Service Employees International only.
	Sep 29 1986	X	Brief amicus curiae of National League of Cities, et al. filed.
	Sep 29 1986	X	Brief amicus curiae of Equal Employment Advisory Council filed.
	Sep 29 1986	X	Brief amicus curiae of City of Detroit, et al. filed.
	Oct 1 1986		CIRCULATED.
	Sep 29 1986	X	Brief amicus curiae of Lawyers' Committee for Civil Rights under Law, et al. filed.
	Sep 29 1986	X	Brief amicus curiae of American Society for Personnel Administration filed.
	Sep 29 1986	X	Brief amicus curiae of California, et al. filed.
	Sep 29 1986	X	Brief amicus curiae of NOW Legal Defense & Educ. Fund, et

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itry	Date	Note	Proceedings and Orders
			al. filed.
'8	Sep 29 1986	X	Brief of respondent Transportation Agency filed.
'9	Oct 3 1986	X	Brief of respondent Service Employees Intl. Union filed.
0	Oct 3 1986	G	Motion of American Federation of Labor and Congress of Industrial Organizations for leave to file a brief as amicus curiae, out-of-time, filed.
1	Oct 20 1986		Motion of American Federation of Labor and Congress of Industrial Organizations for leave to file a brief as amicus curiae, out-of-time, GRANTED.
2	Nov 3 1986		Original and 10 copies of petitioner's lodging received.
3	Nov 3 1986	X	Reply brief of petitioner Paul E. Johnson filed.
4	Nov 12 1986		ARGUED.

Supreme Court, U.S.
FILED
DEC 31 1985
JOSEPH F. SPANIOL, JR.
CLERK

85-1129

In The

Supreme Court of the United States

October Term, 1985

PAUL E. JOHNSON,

Petitioner,

v.

TRANSPORTATION AGENCY, SANTA CLARA COUNTY, CALIFORNIA, and SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 715,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

— AND APPENDIX —

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QUESTION PRESENTED

May a public employer lawfully promote a less-qualified female candidate over a more-qualified male employee allegedly pursuant to an affirmative action plan adopted solely to eliminate a statistical disparity in the work force, unrelated to sex discrimination?

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OPINIONS BELOW

The opinion and order of which review is sought is reported as *Johnson v. Transportation Agency, Santa Clara County, California,* 748 F.2d 1308 (9th Cir. 1984), appearing at pages 17a-47a of the Appendix. The denial of rehearing and modification of opinion appear at pages 48a-52a of the Appendix. The judgment, findings of fact and conclusions of law of the district court are unpublished, but are reproduced at pages 1a-16a of the Appendix.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit rendered judgment against Petitioner on December 4, 1984. Rehearing was sought but denied on September 5, 1985. By order of the Circuit Justice, the Honorable William H. Rehnquist, the time for the filing of this Petition was extended from December 4, 1985, to and including January 3, 1986.

This Court's jurisdiction arises pursuant to 28 U.S.C. § 1254(1) (1976), in that the decision of the Ninth Circuit creates a conflict in the decisional law of the circuits.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This action is based on Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (1982).[1] The applicable provision states in part:

[1]This case was pleaded and tried by general reference to Title VII, 42 U.S.C. § 2000e *et seq.* (1982). For the convenience of the Court, only one section is reproduced herein.

§ 2000e-2. Discrimination because of race, color, religion, sex, or national origin

(a) Employers. It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; . . .

42 U.S.C. § 2000e-2(a)(1) (1982).

STATEMENT OF THE CASE

I. Facts And Background

Petitioner Paul E. Johnson was denied a promotion solely on account of his sex, pursuant to the affirmative action plan adopted by Respondent, the Santa Clara County Transportation Agency (Agency). The Agency's affirmative action plan, dated December 18, 1978, is voluntary and non-collectively bargained, covering all phases of employment. The plant was adopted to remedy a statistical imbalance in the Agency's work force, although no discrimination has ever occurred.[2] The plan incorporates no quotas, instead adopting a long-range goal of attaining a work force comprised of 36.4% women, minorities and handicapped persons, the same percentage as is represented in the countywide work force. The plan has no termination date.

[2]Figures in the plan showed that 100% of the individuals in the skilled-craft worker category were men, including both Road Dispatcher positions. [App. 19a, 26a, 27a.]

Johnson is a 60 year-old white male, who has been employed by the Transportation Agency since 1967. In 1974, Johnson applied to be a Road Dispatcher. He placed second on the merit eligibility list but was not appointed. Thereafter, Johnson requested a voluntary demotion to Road Maintenance Worker II to increase his experience and opportunities for promotion within the Agency. A Road Dispatcher position opened in December 1979, and Johnson, then 54, once again applied. [App. 18a.]

In April 1980, a two-member board interviewed all of the applicants, and seven of the nine applicants, including Johnson, scored the required 70 and were placed on the merit eligibility list. Johnson scored 75, placing second. Ms. Diane Joyce, the individual ultimately promoted, scored third with 72.5 points, rounded up to 73. [*Id.*] Members of the Agency's Road Division conducted a second oral interview with each applicant on the list. The second oral board determined that Johnson was the best qualified candidate[3] and unanimously recommended that he be promoted. [App. 19a.] Joyce still ranked third after the second interview.

During the selection process, Joyce contacted the County's Women's Coordinator, Ms. Helena Lee, because she, Joyce, understood that Johnson was to be appointed. Lee told Mr. Victor Morton, the Agency's Affirmative Action Coordinator, about Joyce's application, and Mor-

---

[3]Paul Johnson had experience as a temporary Road Dispatcher for the Agency and had worked in a similar position for a private company before his employment by the County. Joyce also had experience as a Road Yard Clerk, Road Maintenance Worker, and a part-time Road Dispatcher.

ton recommended to Mr. James Graebner, the Director of the Transportation Agency, that [illegible] be promoted because she was the only applic[illegible]hin a "protected class." [App. 19a.] Graebner testified that he knew Johnson had "placed top," but he thought both Joyce and Johnson were capable. However, Graebner conceded, when examined as an adverse witness, that he did not inspect the applications or the documentation, nor was he concerned with the make-up of the test. [App. 3a, 12a.] Graebner decided to promote Joyce to the position. Although Graebner had made appointment decisions in other divisions, this was the first and only time Graebner personally made a promotion decision within the Roads Operation Division.

No one has disputed that both the oral boards and the examination process were fair and in accord with the Merit System Rules.[4] Instead of following the recommendations, however, Graebner decided to promote Joyce because of her sex, and he used the Agency's affirmative action plan as the rationale for doing so.

Following Joyce's promotion, Johnson filed a complaint with the E.E.O.C. and received a right-to-sue letter in 1981. Thereafter, he filed his complaint in federal district court, charging the Agency with discrimination based

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[4]Section 700 of the County Charter, adopted pursuant to the California State Constitution, specifies that promotions in administrative services of the County shall conform with Merit System Rules and all applicable law, including those pertaining to the effectuation of equal employment opportunities and affirmative action programs. The Charter further provides that no county employee shall be unlawfully discriminated against because of sex.

on sex. He argued that the Agency's decision to promote a less-qualified woman violated Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* [App. 20a.]

II. Decisions Below

A. The District Court's Decision

The federal district court for the Northern District of California ruled that Johnson had suffered illegal discrimination because of his sex, in violation of Title VII. *Johnson v. Transportation Agency*, No. C-81-1218-WAI (SJ) (N.D. Cal. July 23, 1982) [App. 1a-16a]. Based upon the testimony of Petitioner and several Agency officials, the court found that Johnson was more qualified for the dispatcher position than Joyce, and but for his sex Johnson would have been promoted to the position. [App. 13a.] The court also found that, but for her sex, Joyce would not have been promoted.

The Agency attempted to rebut this *prima facie* showing by asserting that the affirmative action plan was a valid means of eradicating past discrimination. However, Graebner testified that, to his knowledge, no woman had filed a complaint alleging discrimination before 1978, the year the plan was adopted. Nor did the plan identify any past discriminatory practices to be remedied. In addition, Graebner testified that the affirmative action plan was permanent, and although it provides for yearly reviews, no such yearly reviews have ever been conducted.

Based on these facts, the district court ruled that the Agency failed to show any discrimination in employment that would support the use of the affirmative action

plan and ruled that the County failed to establish the validity of the plan when tested against *United Steelworkers of America v. Weber*, 443 U.S. 193, 208 (1979). First, the court determined that the plan was not temporary.

> There is nothing within the county plan . . . which is consistent with any temporary remedial purposes. Rather, it contains 82 full pages of instruction pertaining to the annual, ongoing and apparently perpetual maintenance of a balanced work force by means of the utilization of an affirmative action plan.

[App. 8a.]

While the district court's decision turned on the permanence of the plan, the court also expressed considerable doubt that the plan had any remedial purpose. [App. 8a-9a.] The Court found, as a matter of fact, that the Agency has not discriminated in the past, and does not now discriminate against women in employment opportunities in general, and promotions in particular. [App. 13a.]

The court held, as a matter of law, that Johnson's rights were unnecessarily trammeled and the action had the effect of creating an absolute bar to his promotion to the position of Road Dispatcher. [App. 14a.] As a remedy, the court ordered the immediate, retroactive promotion of Johnson, as well as back pay and costs, and enjoined the Agency from further discrimination against him. [App. 15a.] The Transportation Agency appealed from the judgment.[5]

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[5]The Service Employees International Union Local 715 intervened in the action and participated in the appeal as an Intervenor-Appellant, although the organization is captioned as an Intervenor-Appellee.

B. The Court of Appeal's Decision.

The Ninth Circuit Court of Appeals reversed, holding that "the district court adopted an overly restrictive view of *Weber*." *Johnson v. Transportation Agency*, 748 F.2d 1308, 1311 (9th Cir. 1984) [App. 17a-47a]. The Ninth Circuit did not reverse the findings of fact, but held as a matter of law that "[i]mplicit in the plan is the intent to stop taking sex into account once the long-range percentage goals are attained." [App. 25a.] Although the plan contains no end-goal or termination date, the Ninth Circuit concluded that "the agency plan is sufficiently temporary." [App. 25a.]

Second, and more importantly, the Ninth Circuit held that "an employer need not show its own history of purposeful discrimination" in order to justify an affirmative action plan. Rather, "[i]t is sufficient for the employer to show a conspicuous [statistical] imbalance in its work force." [App. 26a.]

REASONS FOR GRANTING THE PETITION

I. THE DECISION OF THE NINTH CIRCUIT IS IN DIRECT AND IRRECONCILABLE CONFLICT WITH SEVENTH CIRCUIT PRECEDENT AND PRECEDENT ESTABLISHED BY THIS COURT.

A. Decisions Of The Ninth And Seventh Circuits Are In Direct Conflict.

The Ninth Circuit's ruling in *Johnson* establishes the principle that a public employer may make sex-based employment decisions under the auspices of an affirmative

action plan adopted in the absence of discriminatory practices. Instead, "[i]t is sufficient for the employer to show a conspicuous [statistical] imbalance in its work force." [App. 26a.]

Thus, Diane Joyce was afforded a remedy for discrimination, i.e., a promotion, even though it was established that neither she nor any other women has suffered from discriminatory treatment at the hands of the County. In fact, Graebner testified that representation of women had increased substantially due to the Agency's efforts. Paul Johnson, on the other hand, has suffered discriminatory treatment, in the guise of affirmative action, and has no remedy unless this Court grants review. According to the Ninth Circuit, a statistical imbalance alone justifies the award of an employment remedy for someone who was never injured by discrimination, and denies any remedy to Johnson who is admittedly the victim of discrimination.

In his dissent [App. 52a], Judge Wallace of the Ninth Circuit correctly noted that this rule of law is in direct conflict with *Janowiak v. Corporate City of South Bend*, 750 F.2d 557 (7th Cir. 1984), *petition for cert. filed*, 53 U.S.L.W. 3896 (U.S. June 10, 1985). In *Janowiak*, the Seventh Circuit had to decide

> whether the City of South Bend could adopt an affirmative action program for its Police and Fire Departments solely upon the basis of a finding that a [statistical] disparity existed. . . .

Id. at 558. The Seventh Circuit concluded "that an employer must proffer more than a finding of a statistical disparity . . . to justify the adoption of an affirmative action program." *Id.* at 562.

These two cases cannot be reconciled nor distinguished. In *Janowiak*, the district court affirmed the validity of the

affirmative action plan adopted "in response to a finding of past discrimination based solely upon a statistical disparity." 750 F.2d at 563. That decision was overturned by the Seventh Circuit "[b]ecause an affirmative action plan must be based upon a finding of past discrimination. . . ." 750 F.2d at 562. In *Johnson,* the Ninth Circuit determined that an affirmative action plan could be upheld based solely on a statistical disparity.

B. The Ninth Circuit's Decision Directly Conflicts With This Court's Decision in United Steelworkers of America v. Weber.

In *United Steelworkers of America v. Weber,* 443 U.S. 193 (1979), this Court set forth the standard for voluntary affirmative action plans. In *Weber,* the voluntary affirmative action plan upheld was based upon discrimination so egregious that the Court could take judicial notice of racial exclusion. *Id.* at 199. Moreover, the plan was "designed to break down old patterns of racial segregation and hierarchy." *Id.* at 208. The plan at issue did not unnecessarily trammel the interests of the white employees, and would end when the existing exclusion of minorities was remedied.

None of these predicates exist here. First, the district court found as a matter of fact and law that no discrimination against women has occurred, based on evidence and testimony presented by the Agency. Instead, the plan is based solely on a statistical disparity. The plan is not intended to break down traditional patterns of exclusion, because exclusionary acts have never occurred. The plan has neither an end date nor criteria to determine the end date. In more than seven years, the percentage goals in the

plan have never been reviewed, nor has any yearly review been completed as the plan requires. Thus, the plan unnecessarily trammels the interests of the male employees because it has no remedial purpose.

CONCLUSION

There is a clear and immediate need for this Court's direction in the lawful formulation and use of affirmative action plans. The dictates of Title VII apply to public and private employers alike, and affect the workforce of the nation. Until this Court provides guidance for determining what is permissible and impermissible under affirmative action, discrimination in the guise of affirmative action will continue. The Court should grant this Petition for Certiorari, and resolve the confusion which exists.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

PAUL E. JOHNSON, Plaintiff, v. TRANSPORTATION AGENCY, SANTA CLARA COUNTY, CALIFORNIA, Defendant.	No. C-81-1218-WAI (SJ) JUDGMENT

This action came duly on for trial before the court sitting without a jury, and having been fully and fairly tried, argued and submitted, and good cause appearing therefore, IT IS ORDERED, ADJUDGED AND DECREED as follows:

(1) That plaintiff have judgment against defendant;

(2) That defendant forthwith appoint plaintiff to the position of Road Dispatcher;

(3) That plaintiff have and recover of defendant the sum of Five Thousand Six Hundred Fifty-Four Dollars and Forty-Eight Cents ($5,654.48), representing all forms of compensation and benefits which plaintiff has not received as the result of his not being appointed to the position of Road Dispatcher in June 1980;

(4) The defendant is enjoined and restrained from discriminatory acts or practices against plaintiff;

(5) That plaintiff is entitled to his reasonable costs of suit; and

(6) That the issue of reasonable attorney's fees will be heard and determined at a time to be set.

DATED: 8-10-82

/s/ William A. Ingram
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

PAUL E. JOHNSON, Plaintiff-Appellee, v. TRANSPORTATION AGENCY, SANTA CLARA COUNTY, CALIFORNIA, Defendant-Appellant,	No. C-81-1218-WAI (SJ) FINDINGS OF FACT AND CONCLUSIONS OF LAW

This preface to the Findings of Fact and Conclusions of Law rendered herein is intended to make as clear as possible my reasons for adopting those Findings and Conclusions.

The evidence preponderates in favor of plaintiff's contention that he is better qualified to be appointed to the position of road dispatcher than is Joyce. In making this finding I have relied upon the testimony of plaintiff, Joyce, Davis, DiBasilio and Beals. Graebner's testimony that the applicants are essentially equal in qualification is not compelling because he appeared to rely primarily upon the posted scores, and did little or nothing to inquire into the results of the interview process and conclusions which Beals described as of critical importance to the selection process.

Based upon the testimony of Graebner, Ex. 13, and the whole chronology of events as described by plaintiff, Joyce and other witnesses, I am satisfied by a preponderance of the evidence that the gender of Joyce was *the determining factor* in her selection.

Admittedly, under merit system rules the appointing authority has discretion in choosing an appointee, so long as such an appointee is on the duly qualified list. Presumably, the exercise of that discretion, if otherwise not limited by law, would allow the appointment of a less qualified person over one better qualified so long as both were included on the qualified list. In the instant case, however, promotion on the basis of gender is a prima facie transgression of Federal law, and to that extent the discretion of the appointing authority must be limited.

The evidence therefore reveals a prima facie case of a Title VII violation. *Teamsters v. Los Angeles,* 431 U.S. 324 (1977); *Harmon v. San Diego County,* 477 F. Supp. 1084 (S.D. Cal. 1979).

The remaining issue in the case, on which defendant has the burden of going forward with the evidence, is whether the preferred treatment accorded Joyce on the basis of her gender is justified on the basis of adherence to the County and Transit District Affirmative Action Plans.

Plaintiff contends as follows:

1) The plans are not temporary measures designed to eliminate manifest racial and gender imbalance but to maintain indefinitely racial and gender

balance. *Cf. United Steelworkers of America v. Weber*, 443 U.S. 193 (1979).

2) Defendant has not asserted the good faith defense set forth in 29 C.F.R. § 1608, and in 42 U.S.C. § 2000e-12(b)(1).

3) The plans do not assert that in the past either the County of Santa Clara or the Transportation Agency have ever discriminated against women, and that there is no historical justification sufficient to permit discrimination in favor of minority employees in violation of the rights of non-minority employees. *Cf. Brunetti v. City of Berkeley*, 12 FEP Cases 937, 940.

4) The Transportation Agency Plan was misapplied in this case because the underrepresentation sought to be redressed by the defendant's personnel action did not in fact exist within the job classification in issue.

5) The Transportation Agency Plan was misapplied because the remedial action sought by the agency in this case was not based upon an underrepresentation of women in an EEOC job category, as required by the plan.

Whether the Affirmative Action Plans in issue comply with the requirements of *Weber, supra*, is the starting point for the analysis of this case. Recently the Ninth Circuit in *La Riviere v. Equal Employment Opportunity Commission*, — F.2d — (May 19, 1982, Slip Op. p. 2103), held that *Weber* is applicable to Affirmative Action Plans implemented by a public employer and that gender based

discrimination prohibitions contained in the Civil Rights Act of 1964 prohibit discrimination against men. The *Weber* case as reiterated in *La Riviere* sets forth four standards under which it can be determined whether or not a particular Affirmative Action Plan can be permissably implemented without running afoul of the provisions of Title VII. These are:

1) That the plan was "designed to break down old patterns of racial [gender] segregation and hierarchy";

2) That the plan did not "unnecessarily trammel the interests of the white [male] employees" by requiring their discharge and replacement with new black [female] hirees;

3) That the plan did not "create an absolute bar to the advancement of white [male] employees";

4) That the plan was a "temporary measure . . . not intended to maintain racial [gender] balance but simply to eliminate a manifest racial [gender] imbalance."

Bracketed words supplied.

Compliance with the fourth element is lacking in this case. Before turning to an examination of the plans, it should be noted that Graeber [sic], the director of the Transportation Agency and the county official primarily charged with the development and implementation of the Transportation Agency Plan, testified that he had predicated his decision to appoint Joyce to the position in question on the fact that there had never been a woman road dispatcher, and that he relied on the goals expressed in the agency Affirmative Action Plan in reaching his decision. He stated that the goal of the agency under the plan is to

employ a number of women consistent with the percentage of women who work in the countywide work force (36.4% in 1978), and stated that each and every job category within the agency remains subject to the Affirmative Action Plan whether or not that percentage of female incumbency has been attained. He stated further that the Affirmative Action Plan is a *permanent* part of the agency's operating philosophy and that there is no *specific time table* as to when everyone within the agency will receive an equal opportunity.[1] He said further that the Affirmative Action Plan is not going to end and will continue to be applied.

In *Weber* the plan there in issue was found to be temporary in nature because it would end when the desired percentage of minority employees had been achieved. In *La Riviere* the plan in issue was by its terms limited to two years and was clearly temporary. In *Valentine v. Smith*, 654 F.2d 503 (8th Cir. 1981), the time limited for goad [sic] achievement was four years which was found not to exceed the time substantially necessary for the accomplishment of the goals which were found to be permissably remedial. Generally speaking, a plan should last no longer than reasonably necessary to eliminate a conspicuous imbalance. *Setser v. Novack Investment Co.*, 657 F.2d 961 (8th Cir. 1981).

The burden is on the employer to offer evidence tending to prove the permissable character of its Affirmative Action Plan. *Setser, supra.*

The testimony of Graeber [sic] does not aid the defendant in its burden to prove a *reasonably* temporary duration of the plan as required under the *Weber* standard.

In evidence are Ex. 2, which is the Affirmative Action Plan of the County of Santa Clara as adopted on October

16, 1979; and Ex. 1, which is the Equal Employment Opportunity Affirmative Action Plan adopted by the Transportation Agency of the County of Santa Clara on December 18, 1978.

There is nothing within the County Plan, Ex. 2, which is consistent with any temporary remedial purposes. Rather, it contains 82 full pages of instructions pertaining to the annual, ongoing and apparently perpetual maintenance of a balanced work force by means of the utilization of an Affirmative Action Plan.

In like manner, the provisions of the Agency Plan, Ex. 1, reveal no discrete time period or ultimate goal to be accomplished within a reasonable time from which the Court can infer that the plan is temporary and remedial, as distinguished from ongoing and designed to maintain balanced employment of persons in categories designed to be protected under the plan.

The defendant had the burden in trial to justify adherence to the Affirmative Action Plan within the rubric of *Weber*. It has not done so.

This does not constitute a square holding that the Affirmative Action Palns [sic] in issue are impermissable under Title VII and 29 C.F.R. § 1680 requirements. I hold only that defendant did not sustain its burden of proof in that regard.

Failure to obtain an Opinion from the EEOC as provided in 29 C.F.R. § 680 [sic] and 42 U.S.C. § 2000e-12(b)(1) and to plead and prove good faith reliance on it is not fatal to the defense, and indicates only that defendant did not avail itself of that course. That circumstance gives rise to no inference one way or the other.

There is nothing on the face of Exs. 1 or 2 which tends to show that the adoption of the Affirmative Action Plan

therein contained was prompted by concededly discriminatory practices committed in the past by the County or the Agency as distinguished from generally prevalent societal attitudes. Graebner testified that to his knowledge no woman had filed a complaint alleging discrimination by the Agency prior to 1978. Defendant relies upon the testimony of Joyce to establish certain alleged acts which it contends show a history of discriminatory practices: (1) 1974 printed job announcement. This was referred to by Joyce as containing the masculine pronoun, but it is not in evidence; (2) Statements made to Joyce while she was an accounts clerk to the effect that her supervisor was "looking for a man to do the job." The evidentiary value of this purported statement is substantially diminished by the fact that Joyce got the job, notwithstanding the apparent desire of the supervisor to have a man; (3) There is no evidence in the record that Joyce was denied assignment as a Road Maintenance Worker because she was a woman; (4) The denial of coveralls for a painting assignment on three occasions may be indicative of discriminatory intent on the part of Mr. Baldanzi, but by itself does not constitute adequate proof of historical justification for an Affirmative Action Plan; Myra Beals testified that she handled road grievances and had one from a woman traffic painter who was excluded from a training program. She got the training as a result of exercising the grievance procedure. I do not feel that these incidents tend to show that the plans were adopted to break down "old patterns of segregation and hierarchy." The burden is upon defendant to prove historical justification. Reference to statistics is made to show patterns of discrimination. Whether defendant has carried the burden with respect to the first criterion of *Weber* is not critical, because my decision is

not based on a failure to carry that portion of defendant's burden.

Plaintiff has alleged a misapplication of the Affirmative Action Plan at least partially due to a misclassification of the position of Road Dispatcher. In view of the foregoing, a decision on the point is unnecessary.

Predicated upon and in implementation of the foregoing, the Court now renders its Findings of Fact.

FINDINGS OF FACT

The Court finds that:

1. Plaintiff, Paul E. Johnson, is a male individual who has been employed by defendant since 1967 and is currently employed by defendant in the job category of Road Maintenance Worker II.

2. Defendant, Transportation Agency, Santa Clara County, is a transit district established, maintained, controlled and managed by the County of Santa Clara, which is a political subdivision of the State of California and an employer within the meaning of Title VII of the Civil Rights Act § 2(b), 42 U.S.C. § 2000e(b).

3. Pursuant to the authority granted by the Constitution of the State of California, the County has adopted a charter for the purpose of local self-government. § 700 of the Charter provides *inter alia* that the personnel system of the County shall be based on merit and equal opportunity; that promotions in the administrative service of the County shall be made in conformance with Merit System Rules and all applicable laws, including those pertaining to the effectuation of equal employment opportunities and affirmative action programs; and that no person employed with the County shall be unlawfully discriminated against because of sex.

4. § 701 of the County Charter provides that employment by the County shall be divided into the unclassified and classified service.

5. The position of Road Dispatcher within the Transportation Agency is in the classified service.

6. In December, 1979, a promotional opportunity announcement was posted for the position of Road Dispatcher.

7. Plaintiff and eight other individuals, including Diane Joyce the individual who was ultimately appointed to the position of Road Dispatcher, filled out a written application form.

8. On April 24, 1980, an oral board consisting of two individuals interviewed the nine applicants, seven of whom scored 70 and above and were therefore certified as eligible under the Merit System Rules for the position of Road Dispatcher.

9. Plaintiff scored 75 on the oral board and Diane Joyce scored 72.5, which was rounded up to 73.

10. A second oral board or interview was then conducted by individuals employed within the Road Operations Division of the Transportation Agency. The seven individuals who passed the first oral board participated in the Second departmental oral board. Plaintiff was the individual unanimously recommended by the second oral board to be appointed to the position of Road Dispatcher.

11. During the selection process, Diane Joyce contacted Ms. Helena Lee, Women's Coordinator, Santa Clara County, and informed Ms. Lee of the promotional opportunity and of the fact that she, Diane Joyce, was ranked

fourth on the eligibility list. Ms. Lee then contacted Mr. Victor Morton, then Affirmative Action Coordinator of the Transportation Agency, and informed Mr. Morton that Diane Joyce had applied for the promotion. Ex. 13.

12. Mr. Morton recommended to Mr. James Graebner, Director of the Transportation Agency, that Mr. [sic] Joyce be promoted to the position of Road Dispatcher. Test. of Graebner.

13. Mr. Ronald Shields, Road Operations Division Director of the Transportation Agency, recommended that plaintiff be appointed to the position of Road Dispatcher. Test. of Graebner.

14. Absent Mr. Morton's recommendation, the decision as to whom to promote to the position of Road Dispatcher would have been made by Mr. Shields or his subordinate, Mr. Alan Jones, Road Maintenance Manager. Test. of Graebner.

15. Mr. Graebner appointed Diane Joyce to the position of Road Dispatcher. Test. of Graebner.

16. Mr. Graebner did not inspect the applications and related examination records of either plaintiff or Diane Joyce before making his decision, as he is authorized to do under the Merit System Rules. Test. of Graebner.

17. The examination of [sic] process, including both oral boards, was fair and was in accord with the Merit System Rules.

18. Based upon the examination results and the departmental interview, plaintiff was more qualified for the position of Road Dispatcher than Diane Joyce.

19. But for plaintiff's sex, male, he would have been promoted to the position of Road Dispatcher.

20. But for Diane Joyce's sex, female, she would not have been appointed to the position of Road Dispatcher.

21. Diane Joyce's sex, female, was the substantial determining factor in her appointment to the position of Road Dispatcher.

22. The Transportation Agency has not discriminated in the past, and does not discriminate in the present against women in regard to employment opportunitities in general and promotions in particular.

23. The Equal Employment Opportunity Affirmative Action Plan, Transportation Agency, County of Santa Clara, dated December 18, 1978, was in effect on the date of the promotion at issue and was used as the rationale for appointing Diane Joyce to the position of Road Dispatcher.

24. The Affirmative Action Plan had no end date or other provision which would have the effect of ending preferential treatment to women. Test. of Graebner; Ex. 1; Ex. 2.

CONCLUSIONS OF LAW

From the foregoing Findings of Fact, the Court makes the following Conclusions of Law:

1. Jurisdiction is conferred by 42 U.S.C. § 2000e and by 28 U.S.C. §§ 1331 and 1343(3).

2. Between December, 1979, and June 1980, there was an opening for the position of Road Dispatcher in the Transportation Agency.

3. Based on the selection process as specified in the County Merit System Rules, plaintiff was the most qualified applicant for the position of Road Dispatcher.

4. The defendant's refusal to promote plaintiff to the position of Road Dispatcher was in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(e) *et seq* as amended.

5. The Affirmative Action Plans of the County Transportation Agency and the County of Santa Clara did not justify the failure to promote plaintiff to the position of Road Dispatcher. The defendant has failed to demonstrate that either or both of the plans are a temporary measure intended to eliminate a manifest imbalance in the work force in the Transportation Agency, but instead, were and are interpreted in such a fashion so as to attempt to maintain an ongoing balance.

6. The defendant has failed to demonstrate that the Affirmative Action Plan of the Transportation Agency will end or be modified in any way at any point in time or when the defendant's work force composition as a whole, by department, by EEOC category or defendant's major job classification reaches a certain number of percentage of women.

7. The above-mentioned action by the Appointing Authority unnecessarily trammeled plaintiff's interests and had the effect of creating an absolute bar to his promotion to the position of Road Dispatcher.

8. The Affirmative Action Plans are not in accord with 29 C.F.R. part 1608 *et seq.*, the EEOC guidelines as to appropriate Affirmative Action Plans under Title VII of the Civil Rights Act of 1964, as amended.

9. The record before this Court, as the foregoing discussion indicates, establishes that plaintiff is entitled to relief.

10. Defendant is hereby ORDERED to appoint plaintiff to the position of Road Dispatcher and is FURTHER ORDERED to pay to plaintiff all forms of compensation and benefits which he has not received as a result of his not being appointed to the position of Road Dispatcher in June, 1980.

11. Defendant is enjoined from any further discriminatory acts or practices against plaintiff.

12. Plaintiff is awarded his costs and reasonable attorney's fees to be determined at a future date.

The issue of reasonable attorney's fees is ORDERED bifurcated, to be heard and determined at the convenience of Court and counsel.

DATED: July 23, 1982.

/s/ William A. Ingram
United States District Judge

FOOTNOTE

[1] "Q. In your mind is—when will the Affirmative Action Plan in connection with women not be applicable to the Transportation Agency as a whole, if ever?

A. The broader goal of affirmative action is something which, as far as I'm concerned, is a permanent part of the agency's basic operating philosphy [sic].

So the broader goal is divorced, if you will, from specific numbers or percentages. In terms of the desire to hire, to promote, to give opportunity and training on an equitable, non-discriminatory basis as part of our operating philosophy, that is a permanent part.

Q. Right. And that would include white males?

A. Yes.

Q. And they would be treated exactly the same as the protected groups?

A. I would like to get to the point where everybody in the agency has, in true fact, equal opportunity. A [sic] protected groups certainly, at this point, have to have an opportunity.

Q. So you can't tell me when—any given time, reference to statistics, that everyone will be treated the same in terms of promotional opportunities without reference to an Affirmative Action Plan.

A. Well as long as we have an Affirmative Action Plan, that obviously is what's going to govern. No, I can't give you a specific time table."

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL E. JOHNSON,	)	
	)	
Plaintiff-Appellee,	)	No. 83-1532
	)	
v.	)	
	)	
TRANSPORTATION AGENCY, SANTA CLARA COUNTY, CALIFORNIA,	)	D.C. No. C-81-1218-WAI (SJ)
	)	
Defendant-Appellant,	)	
	)	OPINION
and	)	
	)	
SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 715,	)	
	)	
Intervenor-Appellee.	)	
	)	

Appeal from the United States District Court
for the Northern District of California
Hon. William A. Ingram, Presiding

Argued and Submitted: February 14, 1984

BEFORE: WALLACE, FLETCHER, and FERGUSON, Circuit Judges

FLETCHER, Circuit Judge:

Plaintiff alleges that he was denied promotion on account of his sex, in violation of Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e *et seq.* The district court rejected defendant's contention that it acted lawfully pursuant to a bona fide affirmative action plan. The district

court granted retroactive promotion and pay and enjoined defendant from further discrimination against plaintiff.

We conclude that the district court misapprehended the requirements for a bona fide affirmative action plan. Guided by *United Steelworkers of America, AFL-CIO-CLC v. Weber,* 443 U.S. 193 (1979), we hold that defendant's affirmative action plan was valid and that defendant acted lawfully pursuant to the plan. We reverse.

I

Defendant is the Santa Clara County Transportation Agency (Agency). Established and maintained by the County of Santa Clara, California, the Agency is an employer within the meaning of Title VII, 42 U.S.C. § 2000e (b).

Plaintiff Paul E. Johnson has been employed by the Agency since 1967. For eleven years, he worked as a road yard clerk. In 1979, when Johnson was a road maintenance worker, the Agency announced an opening for a road dispatcher. A dispatcher allocates crews, equipment, and materials among the various road maintenance jobs in Santa Clara County. Johnson had experience as a temporary road dispatcher for the Agency, as well as with a private company before his employment by the county.

Johnson and eight others applied for the dispatcher position. Seven applicants achieved the required 70 or above on an examination given by a two-member oral board. Johnson tied for second with a score of 75. Diane D. Joyce, the only female applicant, placed fourth on the examination with the third highest score of 72.5, rounded to 73. Like Johnson, Joyce was a long-time Agency employee with

considerable experience as road yard clerk, a road maintenance worker, and a part-time road dispatcher.

Employees of the Agency's Road Operations Division conducted a second, departmental oral board for the seven applicants who successfully completed the first board. The examiners unanimously recommended Johnson for the dispatcher position. Meanwhile, Joyce informed the County Women's Coordinator that she was ranked fourth on the dispatcher eligibility list. The Women's Coordinator informed the Agency's Affirmative Action Coordinator that Joyce had applied. The Affirmative Action Coordinator recommended to the Agency Director that Joyce be appointed. The Director appointed Joyce to the position of road dispatcher.

The Director promoted Joyce under the Agency's voluntary, non-collectively bargained, affirmative action plan dated December 18, 1978 (plan). The plan did not set quotas in any job classification. Rather, the plan established a long-range goal to attain a work force whose composition in all major job classifications approximated the distribution of women, minorities, and handicapped persons in the County labor market. The plan specified no past discriminatory Agency practices; it simply stated that women had been traditionally underrepresented in the relevant job classifications and recognized an extreme difficulty in increasing "significantly the representation of women in certain of those technical and skilled-craft jobs." In 1978, both of the road dispatchers were men. In fact, not one of the Agency's 238 skilled craft positions was held by a woman.

Johnson complained to the EEOC. He received a right-to-sue letter from the EEOC in March 1981 and sued the Agency. Johnson challenged the Agency's failure to promote him to the position of road dispatcher, in favor of a less qualified woman, solely as a violation of Title VII.[1]

Neither party denied that the examination process was fair and in accord with Merit System Rules derived from the county charter. Based upon the examination results and the departmental interview, the district court found that Johnson was better qualified for the dispatcher position that Joyce. The court found further that, but for his sex, Johnson would have been promoted to the road dispatcher position, and, but for her sex, Joyce would have not been so promoted. The court concluded that the Agency's refusal to promote Johnson violated Title VII.

The district court rejected the Agency's defense that its actions were justified by its adherence to the Agency affirmative action plan. The court held that the Agency had failed to meet its burden of producing evidence that adherence to the plan was justified under *United Steelworkers of America, AFL-CIO-CLC v. Weber*, 443 U.S. 193 (1979). Specifically, the court held that the Agency failed to show that its plan was temporary and remedial rather than permanent and designed to maintain a particular balance. As a result, the court concluded, the Agency's actions unnecessarily trammeled Johnson's in-

terests and had the effect of creating an absolute bar to his promotion to the road dispatcher position. While the district court stressed that its decision was based upon the Agency's failure to satisfy the requirement that the plan be temporary, the court also expressed considerable doubt that the plan was appropriately designed to break down entrenched patterns of discrimination.[2]

The district court ordered retroactive promotion of Johnson, awarded him back pay based on the promotion, and enjoined the Agency from further discrimination against him. The Agency appeals from the judgment of unlawful discrimination. We have jurisdiction under 28 U.S.C. § 1291.

II

In *United Steelworkers of America, AFL-CIO-CLC v. Weber*, 443 U.S. 193 (1979), the Supreme Court held that Title VII does not forbid private employers and unions from agreeing to the voluntary adoption of a bona fide affirmative action plan aimed at eliminating racial imbalance in traditionally segregated job categories. The Court observed that the prohibition against racial discrimination in Title VII must be examined in light of the legislative history of the Act and the historical context from which it arose. *Id.* at 201. The primary goal of Title VII was the integration of blacks into the economic mainstream of American society. *Id.* at 202. Not only was the statute itself intended to be remedial, but Congress also hoped that Title VII would "create an atmosphere conducive to voluntary or local resolution of other forms of discrimination." H.R. Rep. No. 914, 88th Cong., 1st Sess., pt. 1, p. 18 (1963), cited in *Weber*, 443 U.S. at 204. The Court concluded that

> [i]t would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had "been excluded from the American dream for so long," . . . constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.

Id. (citation omitted).

Although *Weber* enthusiastically endorsed private-sector affirmative action, the Supreme Court recognized the need for limitations. As the Eighth Circuit has said, courts must "ensure that new forms of invidious discrimination are not approved in the guise of remedial affirmative action." *Setser v. Novack Investment Co.*, 657 F.2d 962, 968 (8th Cir.) (en banc), *cert. denied*, 454 U.S. 1064 (1981). The Court has yet to "define in detail the line of demarcation between permissible and impermissible affirmative action plans," but the Court noted several aspects of the *Weber* plan that placed it "on the permissible side of the line." *Weber*, 443 U.S. at 208. The plan (1) was designed to break down old patterns of racial segregation and hierarchy, (2) did not unnecessarily trammel the interests of white employees, (3) did not create an absolute bar to the advancement of white employees, and (4) was a temporary measure, "not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance." *Id.*

In *LaRiviere v. EEOC*, 682 F.2d 1275 (9th Cir. 1982), we applied *Weber* to an affirmative action program implemented by a public employer to remedy long-standing male-female imbalance in the work force. We determined that the plan to hire and train women as California Highway Patrol traffic officers satisfied the *Weber* guide-

lines. *Id.* at 1280. Thus, the plan could "be utilized consistently with Title VII without giving rise to liability to applicants who are excluded from the program solely because they belong to the opposite sex." *Id.*

A careful examination of the record in this case and of the opinion below persuades us that the district court adopted an overly restrictive view of *Weber*. We conclude that the Agency affirmative action plan contains the same characteristics that the Supreme Court relied upon in upholding the *Weber* plan. The Court observed that "[t]he purposes of the [*Weber*] plan mirror those of the statute." 443 U.S. at 208. We conclude that the purposes of the Agency plan also mirror those of Title VII.

Because the district court based its decision on its perception that the plan was not a temporary measure, we begin there. The district court found that "[t]he Affirmative Action Plan had no end date or other provision which would have the effect of ending preferential treatment to women." The court cited the 1978 Agency plan, the 1979 county plan, and the testimony of James Graebner, the Agency Director.

While the Agency plan contains no date certain or other express statement of fixed duration, it also contains no statement that it is intended to be permanent. Moreover, the entire focus of the plan is on "attaining," rather than maintaining, balance. The Agency plan, like the county plan, repeatedly speaks of "attainment." Part IV states: "The Agency long-range goal is to attain a work force whose composition in all job levels and major job classifications approximates the distribution of women, minority and handicapped persons in the Santa Clara County work force." The plan sets forth percentage long-

range goals for the "attainment of equitable representation." Unlike the district court, we believe that this emphasis upon the "attainment" of a representative work force does "have the effect of ending preferential treatment to women" once parity is achieved.

The district court was persuaded, in part, by Graebner's testimony that affirmative action "is a permanent part of the agency's basic operating philosophy" and even to the effect that the Agency plan will never end. Graebner's testimony must be considered in conjunction with the plan itself, however, with its emphasis on "attainment." Read in context, Graebner's testimony is no more than an expression of the Agency's long-range commitment to affirmative action, and certainly not the expression of an Agency policy to continue the program beyond the point that the law allows. Graebner's own preface, printed at the front of the Agency plan, speaks repeatedly of "attainment" of a representative work force and of the plan's objective "to correct . . . deficiencies."

Plans like this one are usually voluntarily adopted by employees [sic] who wish to express and act upon their commitment to social justice. They should not be rigidly interpreted so as to make their validity depend on technicalities in drafting. To do so would only discourage their adoption and encourage litigation. The district court's assumption that *Weber* requires an expressed date certain for termination or some other express provision that would trigger the end of an affirmative action plan was erroneous. The *Weber* Court did not establish a rigid formula for testing the validity of an affirmative action plan. The Court simply noted that one saving aspect of the *Weber* plan was its temporary nature. Undoubtedly,

a plan must end when its remedial function has been served. The fact that the plan must end, however, does not necessitate the inclusion of an explicit ending provision. We read *Weber* to require that a plan be temporary in the sense that it must end when its goals of parity are met. In that regard, we note a fundamental difference between the Agency plan and the *Weber-LaRiviere* type of plan. In *Weber,* a fixed percentage (50%) of openings in an in-plant craft-training program was reserved for black employees, in order to hasten achievement of the long-term percentage goal (39%) for black representation in the job category. Similarly, in *LaRiviere* a fixed percentage (50%) of the openings in a pilot study, designed to determine the feasibility of employing female traffic officers, was reserved for women. In both cases, the requirement that a fixed percentage of openings be filled by minorities necessitated a reasonably explicit deadline.[3] By contrast, although the goal of the Agency plan here is also to achieve parity, the plan does not establish fixed percentages for hiring, training, or promotion. Rather, the plan allows flexibility in working towards the long-range goals, with special emphasis on recruitment, selection, training, and promotion of minorities, women, and the handicapped.

We conclude that the Agency plan is sufficiently temporary. To paraphrase *Weber,* the plan is not intended to maintain male-female balance, but simply to eliminate a manifest male-female imbalance. Implicit in the plan is the intent to stop taking sex into account once the long-range percentage goals are attained. Nothing in the plan indicates a contrary intent. Nor is there evidence that parity had already been achieved when Joyce was appointed and that the plan was being used improperly to maintain

balance in numbers of each sex. Quite the opposite is true. When Joyce was promoted to road dispatcher, the Agency's 237 other skilled craft positions were all held by men.

Like the *Weber* plan, the Agency affirmative action plan is a remedial effort intended to break down entrenched patterns of discrimination. The Agency plan contains extensive statistics illustrating the underrepresentation of women, minorities, and the handicapped in various Agency job categories. The plan acknowledges "entrenched patterns in hiring and promotion" and recognizes the particular difficulty of achieving parity in upper-level positions when discriminated groups have been traditionally excluded from trainee-level jobs.

In order to demonstrate that its plan is remedial, an employer need not show its own history of purposeful discrimination.[4] It is sufficient for the employer to show a conspicuous imbalance in its work force. *See Setser v. Novack Investment Co.*, 657 F.2d at 968. This is well illustrated by *Weber*, in which the employer hired as craftworkers only persons who had previous craft experience. Because blacks had historically been excluded from craft unions, few had previous craft experience and, consequently, few were hired. *Weber*, 443 U.S. at 198-99. Although the employer did not engage in purposeful discrimination, only 1.83% of the employer's skilled craft workers were black. Because the local work force was 39% black, the employer was justified in adopting an affirmative action plan.

Statistics are extremely useful in showing a conspicuous work force imbalance. We note particularly the difficulty that may confront an employer whose plan is in-

tended to remedy discrimination resulting from societal norms. Some forms of discrimination are so subtle or so accepted that they defy proof other than by statistics. In *Weber,* the exclusion of blacks from craft unions was so pervasive as to warrant judicial notice. *Weber,* 443 U.S. at 198 n. 1.

The promotion of Joyce to the road dispatcher position aptly served the Agency plan's remedial purpose. Statistics contained in the plan show that not one of the Agency's 238 skilled craft workers was a woman. Included in the skilled craft category are mechanics, body and fender repairers, construction inspectors, road maintenance workers, and road dispatchers. A plethora of proof is hardly necessary to show that women are generally underrepresented in such positions and that strong social pressures weigh against their participation. The promotion of Joyce was a lawful attempt to remedy the conspicuous imbalance.

Weber also warns that a plan must not create an absolute bar to the advancement of other employees or unnecessarily trammel the interests of other employees. 443 U.S. at 208. The more closely a plan adheres to its remedial purpose, the less likely it is that the plan will unreasonably infringe upon the interests of other employees. *See Setser,* 657 F.2d at 968.

The affirmative action plan in *Weber* did not deprive white employees of opportunities for advancement, but created additional opportunities by establishing a *new* training program for both blacks and whites. *Weber,* 443 U.S. at 198. Thus, although black employees received training in preference to senior white employees, the ex-

pansion of opportunities previously limited by seniority prevented undue infringement upon non-minority interests. While the *LaRiviere* plan did not necessarily create new openings, it did admit both male and female applicants. As in *Weber,* the *LaRiviere* plan reserved 50% of the openings in the program for applicants from the discriminated group.

While the Agency plan does not establish specific programs for recruitment, hiring, training, or promotion, it does lay a solid foundation for affirmative action. It assigned tasks and presents timetables for achieving long-range and short-range employment goals. The import of the plan, as with any lawful affirmative action plan, is to give preference to members of underrepresented groups. The plan does not indicate, however, that other employees will be barred or that their interests will be unnecessarily infringed. In fact, as in *Weber,* the plan contemplates the expansion of opportunity for all. Shortly before the plan was adopted, the county approved 734 new Agency positions to support the expansion of the county bus fleet from 236 to 516 buses. The plan notes that "[a]s the County Transit System continues to expand, additional positions will need to be authorized."

Johnson argues that the selection of Joyce as road dispatcher served as a complete bar to his selection for the position. We reject this narrow view. The instant case differs markedly from *Weber* and *LaRiviere* in that it does not involve the admission of numerous applicants into a training program. Rather, it concerns the selection of one applicant for a single opening. When there is but one opening, the selection of one candidate will necessarily result in exclusion of all others. Unless we are shown

a distinct pattern of exclusion of non-minority candidates from such positions, we cannot conclude that a single employment decision serves as a bar or unnecessarily trammels the interests of other employees. The record contains no evidence of such a pattern in this case. Pursuant to the Agency plan, Joyce's sex was viewed as an additional positive factor in an otherwise qualified candidate. The fact that her sex may have been the decisive factor in the selection of a woman for this particular opening does not indicate that men will always be excluded.

We conclude that the Agency plan, like the *Weber* plan, "falls on the permissible side of the line." We hold that the Agency's selection of Joyce, pursuant to the plan, was a lawful effort to remedy an entrenched pattern of manifest imbalance. We are not unsympathetic to the complaint of Johnson and others before our court that employers' attempts to remedy past discrimination sometimes visit burdens upon individual members of the non-minority group. As the Agency plan recognizes, however, "the mere existence of an opportunity for members of [discriminated] groups to apply for jobs . . . will *not* by itself result in timely attainment of parity for currently underrepresented groups." Affirmative action is necessary and lawful, within the guidelines of *Weber*, to remedy long-standing imbalances in the work force.

REVERSED.

FOOTNOTE

[1] Although there is state action in this case, *see e.g., Virginia v. Rives*, 100 U.S. 313, 318 (1880), Johnson did not challenge the affirmative action plan on equal protection grounds and we do not reach the issue.

[2] The district court's opinion is not entirely clear as to whether it inappropriately placed the burden of persuading the court of the plan's validity on the employer. The Supreme Court's decision in *McDonnell Douglas v. Green*, 411 U.S. 792 (1972) explains the order and burdens of proof in a typical Title VII case. First the plaintiff must present a *prima facie* case of discrimination. *McDonnell Douglas*, 411 U.S. at 802. Then the employer must articulate a legitimate, nondiscriminatory reason for its decision. *Id.* The plaintiff then must convince the court that the employer's proffered reasons were actually a pretext for discrimination. *McDonnell Douglas*, 411 U.S. at 804-05.

We agree with the Eighth Circuit's analysis in *Setser v. Novack Investment Co.*, 657 F.2d 962 (8th Cir.) (en banc), *cert. denied*, 454 U.S. 1064 (1981), which applied the *McDonnell Douglas* formula to an affirmative action case. In order to meet the burden of articulating a nondiscriminatory reason for its hiring decision, the employer need only produce "some evidence that its affirmative action plan was a response to a conspicuous . . . imbalance in its work force" and "some evidence that its affirmative action plan is reasonably related to the plan's remedial purpose." *Setser*, 657 F.2d at 968. Once an employer has produced evidence that its refusal to hire the plaintiff was a consequence of its implementation of the plan, the employer is entitled to judgment unless the plaintiff proves the plan is invalid. *Setser*, 657 F.2d at 962.

We disagree with the dissent's analysis that the employer's assertion that it made its hiring decision pursuant to its affirmative action plan is an affirmative defense imposing a burden of going forward and persuading (as contrasted to a burden of production). However, in this case, the employer has met the higher burden—the plan is bona fide, meets the tests of *Weber*, and responds to a need to correct an overwhelming imbalance in the work force (all of Agency's 238 skilled craft positions were held by men until Joyce was hired, making it 237 to 1).

[3] Yet it is not clear that the *Weber* plan was any more expressly limited than the Agency plan. "The 'Joint Committee' thereafter entered into a 'Memorandum of Understanding' which established a goal of thirty-nine percent as the percentage of minorities that must be represented in each 'craft family' at the Kaiser Gramercy plant." *Weber v. Kaiser Aluminum & Chemical Corp.*, 415 F.Supp. 761, 764 (E.D. La. 1976) (footnotes omitted), *cited in Weber*, 443 U.S. at 199.

[4] Although the district court rejected the Agency plan as a defense on the ground that it was not shown to be temporary, it also expressed doubt as to the plan's remedial intent. This concern hinged upon the court's finding that "[t]he Transportation Agency has not discriminated in the past, and does not discriminate in the present against women in regard to employment opportunities in general and promotions in particular." The district court apparently assumed that an employer must show his own history of purposeful discriminatory patterns or practices.

RE: *Johnson v. Transportation Agency—No. 83-4532*

WALLACE, Circuit Judge, concurring in part and dissenting in part:

This "reverse discrimination" case presents some difficult questions arising from the application of an affirmative action plan. I conclude that the record before us is insufficient to make broad pronouncements of judicial policy. I would vacate and remand this case for two reasons. First, the record suggests that the district court improperly allocated the burdens of persuasion and production between the parties. Second, the court did not make sufficiently detailed findings on the plan to hold it invalid.

I

The facts of this case, referred to in part by the majority, are significant. Johnson, a 58 year-old white male, has lived in Santa Clara for many years. After working 17 years for a cement company, including 7 years as a dispatcher and 8 years as a supervisor, he quit rather than accept a transfer that would uproot his family. Instead, he took a job with the Agency. He worked the better part of 11 years in the position of Road Yard Clerk II, requisitioning road materials for operations, processing purchase orders and arranging material provisions in emergencies. Eventually, however, he concluded that the job offered him little chance for advancement. He requested a voluntary demotion to Road Maintenance Worker II, hoping that the Road Maintenance Division would provide better opportunities for promotion to a position such as road dispatcher.

Agency road dispatchers assign crews, equipment, and materials to road maintenance job sites. They must keep accurate records on the status and availability of workers, materials, and equipment at those sites and need a working knowledge of all those things as well as of the various roads maintained by Santa Clara County. Job candidates usually have four years of experience in either dispatch or road work, and can operate a radio telephone. In 1974, Johnson applied to be a road dispatcher but placed second and failed to get the job. The position re-opened in December 1979, by which time Johnson had gained more road work experience, including several months work "out of class" as a road dispatcher. He and eight others applied for the position. Seven of them scored over the required 70 on the examination given by a two-member oral board on April 24, 1980.

Johnson placed second, with a score of 75. Employees from the Agency's Roads Division then conducted a second oral board for the seven qualifying applicants, and unanimously recommended Johnson for the job. Neither party denied that both the oral boards and the examination process were fair and in accord with Merit System Rules derived from the County charter. Section 7 of that charter prohibits sex discrimination and ensures promotions based on merit and equal opportunity.

Diane Joyce, the woman the Agency ultimately hired instead of Johnson, placed fourth on the examination, scoring 72.5, rounded up to a 73. She had worked as a road maintenance worker for five years and before that a bookkeeper, account clerk, and senior account clerk. She wanted to be a road dispatcher in 1974, but lacked the requisite experience for consideration. During the selection process

in 1980, she contacted the County's Women's Coordinator, Lee, and told her about the job opening. Joyce reported that she had placed low on the eligibility list, however. Lee told Morton, the Agency's Affirmative Action coordinator, about Joyce and Morton recommended Joyce's promotion to Graebner, the Director of the Agency. Graebner then promoted Joyce. It was the only time he had ever directly made a promotion decision within the Roads Operation Division. Without Morton's recommendation, one of Graebner's subordinates would have made the road dispatcher appointment.

Graebner promoted Joyce under a voluntary, non-collectively bargained affirmative action plan dated December 18, 1978 (plan). The plan set no "quotas," *per se,* in any job classification, but rather had long-range percentage goals aiming at some numerical parity with women available in the local labor market. It specified no past discriminatory Agency practices, identified no history of purposeful exclusion it sought to remedy, and did not follow Equal Employment Opportunity Commission (EEOC) guidelines, *see* 29 C.F.R. § 1608.1-.12 (1983). It simply stated that the relevant job classifications had traditionally underrepresented women, and recognized an extreme difficulty in increasing "significantly the representation of women in certain of those technical and skilled-craft jobs." When Graebner promoted Joyce under the plan, he did not carefully inspect the applications and related examination records of Joyce and Johnson, as the County's Merit System Rules authorized him to do. He thought he simply retained discretion to pick from among the top candidates who had crossed a certain threshold of ability.

II

In Title VII cases, "the ultimate question" is "discrimination *vel non.*" *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 714 (1983) (*Aikens*). The existence of an affirmative action plan does not change this essential inquiry.

Title VII plaintiffs may challenge promotion decisions under either disparate treatment or disparate impact theories. Johnson asserts only a disparate treatment claim of the classic Title VII kind: the Agency intentionally and unjustifiably treated him differently only on the basis of his sex. "The 'factual inquiry' in a Title VII case is '[whether] the defendant intentionally discriminated against the plaintiff.'" *Aikens*, 460 U.S. at 715, *quoting Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). Of course, the fact that Johnson is a white male is irrelevant to his quantum of protection under Title VII. *E.g., McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 280 & n. 8 (1976). "[A] plaintiff's ultimate burden of persuasion remains the same regardless of race [or sex]: he must prove that the defendant intentionally discriminated against him." *Lanphear v. Prokop*, 703 F.2d 1311, 1315 (D.C. Cir. 1983).

In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (*McDonnell Douglas*), the Supreme Court first comprehensively addressed "the order and allocation of proof in a private non-class action challenging employment discrimination." *Id.* at 800. At the time, and later, the Court recognized that "[t]he facts necessarily will vary in Title VII cases, and the specification . . . of the prima facie proof . . . is not necessarily applicable in every respect to differ-

ing factual situations." *Id.* at 802 n. 13, *quoted in Furnco Construction Corp. v. Waters,* 438 U.S. 567, 575-76 (1978) (*Furnco*). The three stages of proof presentation and burden shifting under *McDonnell Douglas* entail no trifurcation of trial, but simply provide courts with "a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." *Furnco,* 438 U.S. at 577; *see generally* B. Schlei & P. Grossman, *Employment Discrimination Law* 1321-22 (2d ed. 1983).

A Title VII plaintiff carries "the initial burden under the statute of establishing a prima facie case of racial discrimination." *McDonnell Douglas,* 411 U.S. at 802. Johnson had to show that sex was the likely reason for the denial of his job opportunity. *See Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 252-53 (1981) (*Burdine*); *Hagans v. Andrus,* 651 F.2d 622, 625 (9th Cir.), *cert. denied,* 454 U.S. 859 (1981); *White v. City of San Diego,* 605 F.2d 455, 458 (9th Cir. 1979). When this burden is met by the employee, it "creates a rebuttable 'presumption that the employer unlawfully discriminated against' him." *Aikens,* 460 U.S. at 714, *quoting Burdine,* 450 U.S. at 255.

At this juncture of the *McDonnell Douglas* analysis, the question arises whether the use of an affirmative action plan to rebut a charge of employer discrimination is properly part of the plaintiff's prima facie case or whether it should be considered as a separate affirmative defense subsequent to *McDonnell Douglas* analysis. If analyzed under the traditional *McDonnell Douglas* test, once a Title VII plaintiff establishes a prima facie case, "[t]he burden then must shift to the employer to articulate some legiti-

mate, nondiscriminatory reason" for the actions that inspired the complaint. *McDonnell Douglas,* 411 U.S. at 802. To rebut the presumption against him, therefore, the employer must "*produc*[*e*] evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, non-discriminatory reason." *Burdine,* 450 U.S. at 255, *quoted in Aikens,* 460 U.S. at 714 (emphasis added). The only burden shifted to the employer is the burden of going forward with evidence that suggests a legitimate defense of his actions. Meeting this burden puts the trier of fact "in a position to decide the ultimate factual issue in the case." *Aikens,* 460 U.S. at 715; *see also Knutson v. Boeing Co.,* 655 F.2d 999, 1001 (9th Cir. 1981) (employee retains the ultimate burden of showing intentional discrimination.)

Under a *McDonnell Douglas* analysis, one legitimate reason an employer may offer to rebut the discrimination presumption, and fulfill his burden of going forward, is a bona fide affirmative action plan. *See, e.g., Hunter v. St. Louis-San Francisco Railway Co.,* 639 F.2d 424, 426 (8th Cir. 1981). The employer must articulate the reasons for rejection clearly, and do so through admissible evidence. *See Burdine,* 450 U.S. at 255 & n. 9, 257-58. When the employer has articulated a reason and rebutted the employee's prima facie case, "the factual inquiry proceeds to a new level of specificity." *Burdine,* 450 U.S. at 255. The employee must have an "adequate 'opportunity to demonstrate that the proffered reason was not the true reason for the employment decision,' but rather a pretext." *Aikens,* 460 U.S. at 716 n. 5, *quoting Burdine,* 450 U.S. at 256; *see McDonnell Douglas,* 411 U.S. at 807. As long as the employee has this opportunity, the trial court must then

decide whether there has been impermissible discrimination.

In this case, the Agency offered an affirmative action plan and other evidence to rebut the presumption that its decision was sex-based. Mere presentation or articulation of any plan, of course, will not rebut the presumption. The employer must show sufficient facts suggesting a legal, bona fide affirmative action plan meeting the minima defined in *United Steelworkers of America, AFL-CIO-CLC v. Weber*, 443 U.S. 193 (1979) (*Weber*), and the law of our own circuit applying *Weber, La Riviere v. EEOC*, 682 F.2d 1275 (9th Cir. 1982). The plaintiff's only Title VII burden of persuasion is to prove discrimination. He need not prove the illegality of an affirmative action plan merely alleged by his employer, or one for which his employer has not produced evidence to meet the prima facie requirements of a bona fide plan. The employer's burden is to go forward with evidence of a legal plan, and it is in his best interest carefully to present the fullest evidence possible.

There is an alternative way to analyze an affirmative action plan: as a separate affirmative defense raised by the employer. This is not a distinction without a difference. The burden of proof under the *McDonnell Douglas* test never shifts from the plaintiff. The burden of proof to demonstrate the validity of a separate affirmative defense rests with the person asserting it: the employer in Title VII cases. It is logical to require the employer to prove the validity of its plan since it is the employer's plan that has allegedly caused a Title VII injury.

The statute already provides a similar type of analysis for one aspect of sex discrimination. Title VII provides a narrow exception that allows classifications or treatment based on sex, but only if sex is "a bona fide occupational qualification reasonably necessary" to an employer's operation. 42 U.S.C. § 2000e-2(e)(1). That statutory exception takes the form of an affirmative defense for the employer: if the court disbelieves his proffered reasons, he may admit discrimination between employees on the basis of sex but argue that the discrimination was justified. *See generally* K. Davidson, R. Ginsburg & H. Kay, *Sex-Based Discrimination* 667-95 (1974); Sirota, *Sex Discrimination: Title VII and the Bona Fide Occupational Qualification,* 55 Tex. L. Rev. 1025 (1977).

Thus, if affirmative action plans are presented as affirmative defenses, the burdens of going forward and persuasion dictated by Supreme Court and Ninth Circuit precedent form a simple and logical framework for deciding these difficult issues. This approach seems to me to provide a better means of analyzing affirmative action plans.

The majority does not discuss this problem, but concludes without analysis that the employer need only show "some evidence" that the plan was in response to a conspicuous work force imbalance and that the plan is reasonably related to the plan's remedial purposes. (Maj. op. at p. 15 n.2.) Then the plaintiff must prove the plan is invalid. I disagree with this analysis. In addition, all that is required by the majority's holding is to vacate the judgment to allow the district judge to apply these new pronouncements on burdens of proof and persuasion. The

subsequent broad pronouncements on whether the plan passes muster under *Weber* are premature.

The record does not indicate clearly whether the district court properly allocated the burdens of going forward and persuasion. Therefore, the record is sufficiently suspect that I would have remanded this case for the proper application of those burdens, and for consideration of the Agency plan as an affirmative defense.

III

The second reason that I write separately is because the district court made insufficient findings on the Agency's affirmative action plan to justify its rejection of the plan.

Title VII embodies a broad legal principle of anti-discrimination. In *Weber,* the Supreme Court held that Title VII does not necessarily preclude voluntary, private affirmative action, and thus carved out a very narrow exception to that principle: it rejects random discrimination against various minorities or whites or males, but allows planned discrimination under very limited circumstances. *See* 443 U.S. at 200. In *La Riviere,* we did not address the constitutional issue but applied *Weber* to a voluntary, *public* affirmative action plan. In each case the result is to sanction some discrimination not otherwise legally conscionable—because based on race or sex—when it aims to remedy purposeful past discrimination.

Courts, however, must be careful to "ensure that new forms of invidious discrimination are not approved in the guise of remedial affirmative action." *Setser v. Novack*

Investment Co., 657 F.2d 962, 968 (8th Cir.), *cert. denied*, 454 U.S. 1064 (1981). The bona fides of affirmative action plans must be evaluated carefully if the employer asserts he has treated plaintiff pursuant to one, because Title VII compels us to consider the rights of individuals, not groups. *See, e.g., Connecticut v. Teal*, 457 U.S. 440, 453-54 (1982); *City of Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 702, 708 (1978).

Two overarching questions guide the analysis of plans: "(1) when it is permissible to initiate an affirmative action plan, and (2) what methods may be employed to prefer one race [or sex] over another." *Setser*, 657 F.2d at 967 n.4. Although *Weber* did not exclusively "define in detail the line of demarcation between permissible and impermissible affirmative action plans," 443 U.S. at 208, it identified at least four factors which *La Riviere* adapted to public plans. The plan: (1) must aim at breaking down historic patterns of racial or social segregation and hierarchy; (2) may not unnecessarily trammel the interests or employment opportunities of other employees; (3) must not absolutely bar the advancement of other employees; and (4) must remain only a temporary measure aimed at manifest racial or social imbalances. *La Riviere*, 682 F.2d at 1279-80, *citing Weber*, 443 U.S. at 208.

The majority evaluated the Agency's plan in light of the four factor test and concluded that the plan was valid. Since a plan must pass muster under all four factors, a separate analysis of each factor is necessary.

A.

The first question is whether the plan breaks down historic patterns of discrimination. The majority con-

cludes that the Agency's plan was remedial, relying solely on the imbalance in the work force. Although I agree that statistics are useful and probative on this issue, a statistical imbalance should not suffice to satisfy this prong of *Weber*. An employer should use an affirmative action plan not only for identifying and making whole victims of discrimination, but also to identify and change the discriminatory organizational practices and conditions that initially produce victims. *See United States Commission on Civil Rights, Affirmative Action in the 1980s: Dismantling the Process of Discrimination* 41 (1981) (Commission Report); *cf. Firefighters Local Union No. 1784 v. Stotts*, 104 S. Ct. 2576, 2588 (1984) (courts can override seniority systems only for each member of minority plaintiff class who was an actual victim of the discriminatory practice and on whom the practice had an individual impact); *see generally* 29 C.F.R. § 1608.4 (1984). Thus, plans must arise in a remedial context: they must respond to a deep historical problem, rather than to random, insensitive acts of individuals over the years. *See, e.g., Weber*, 443 U.S. at 198 n.1 (citing deliberate racial exclusion as a legitimizing precondition for affirmative action plans in the construction industry, among others.)

A judicial inquiry demands no official, administrative or judicial determination of discrimination. *See Local Union No. 35 v. City of Hartford*, 625 F.2d 416, 422 (2d Cir. 1980), *cert. denied*, 453 U.S. 913 (1981). Nevertheless, the employer must be able to point to past or present discriminatory patterns and practices that created the traditional segregation of the job categories in question. Merely "arguable" violations are not enough. *Cf. Weber*,

443 U.S. at 211 (Blackmun, J., concurring). Past discrimination implies some discriminatory cause for the present underrepresentation in the employer's job category and allows the court to go beyond the effects of socially created, accidental differences. Remedies affect causes; as a remedy, a plan must bear a relationship to the causes of discrimination so that it can change the discriminatory organizational practices that initially created victims. *See, e.g.,* Commission Report, *supra,* at 41.

In this regard, statistics that show a conspicuous work force imbalance help greatly: they function as quantitative clues that "raise questions rather than settle them" and pinpoint areas requiring "further investigations into the factors that produce the statistical profile." Commission Report, *supra,* at 36. These statistical studies, of course, should adjust for demographically relevant variables in their comparisons between the work force and local labor pool. *See, e.g., United States v. City of Miami,* 614 F.2d 1322, 1352-53 & n.5 (5th Cir. 1980) (Gee, J., dissenting), *modified on other grounds,* 664 F.2d 435 (1981) (en banc). Because plans are remedial, however, an employer cannot rely on statistics alone as a short-cut around the critical need for causal evaluation and analysis. *See* Commission Report, *supra,* at 36. Therefore, I consider the majority's approach too superficial for the analysis required under the first prong of *Weber,* and disagree with it.

B.

The second inquiry is whether the plan unnecessarily trammels the interests of non-minority employees. A bare affirmation that the more reasonably the plan relates to

its remedial purpose in specifics, *see, e.g., Ende v. Board of Regents of Northern Illinois University,* 565 F. Supp. 501, 507 & n. 3, 509 (N.D. Ill. 1983), the less chance it will so invade "the interests of majority workers that it violates Title VII," *Parker v. Baltimore & Ohio Railroad Co.,* 652 F.2d 1012, 1016 (D.C. Cir. 1981), is insufficient. We must scrutinize carefully the reasonableness of the plan's measures to prevent the majority employees from having their "rights . . . bartered away by the employer in order to buy his private peace." *City of Miami,* 614 F.2d at 1352 n. 3 (Gee, J., dissenting). At the most obvious level, therefore, a plan may not simply "require the discharge of white workers and their replacement with new black hirees." *Weber,* 443 U.S. at 208; *accord La Riviere,* 682 F.2d at 1279. More generally, the plan may not unnecessarily close off channels of employment to non-minorities. *See Parker,* 652 F.2d at 1014. A court's serious evaluation of a plan's measures can settle such questions as whether it in reality uses a "quota" rather than a "goal," and can establish the reasonableness of the plan with respect to non-minority employees. The record does not demonstrate such an inquiry. Therefore, I conclude that the majority is not in a position to pass on this issue.

C.

The third issue to be addressed is whether the plan absolutely bars the advancement of non-minority employees. This inquiry is closely related to the one above, and the answer will depend on several factors, including the number and nature of the applicants, the number of contested jobs available, and employee expectations. The affirmative action program in *Weber* did not deprive white

employees of opportunities for advancement, but created new opportunities by establishing a training program for both blacks and whites. *Weber,* 443 U.S. at 198. Thus, although "black employees' receiv[ed] training in preference to senior white employees," *id.* at 199, the expansion of opportunities previously limited by seniority prevented any problem. *See also La Riviere,* 682 F.2d at 1280. Under *Weber,* the safest plans minimize non-minority employee displacement and do not concentrate the costs of affirmative action "upon a relatively small, ascertainable group of non-minority persons." *EEOC v. Local 638,* 532 F.2d 821, 828 (2d Cir. 1976); *cf.* Gewirtz, *Remedies and Resistance,* 92 Yale L.J. 585, 605 (1983) (effective remedies must operate within third-party cost constraints). The district court did not analyze this issue sufficiently, and I would have remanded this case for a more detailed consideration.

D.

The final question is whether the plan remains only a temporary measure. The majority concluded that the plan was temporary because it did not state expressly that it would be permanent, and purported to *attain* rather than to *maintain* a sexual balance. Thus, the majority concludes that *Weber* endorses all plans which do not admit to being permanent, but which end when their goals are met. This interpretation of *Weber* is too broad, and reads the temporary requirement out of the test by making it a hurdle over which any artfully drawn plan can jump. The saving grace of the plans in *Weber* and *La Riviere* was their expressly temporary duration. *See Weber,* 443 U.S. at 208-09; *La Riviere,* 682 F.2d at 1280. Moreover, a broad

reading of *Weber* is unnecessary in this case. The disputed facts in the record, particularly Graebner's testimony, does not justify the majority's conclusion that the plan was temporary. An appellate court is not in a position to make this factual determination. The district court should have the opportunity to weigh this evidence properly, and I would remand this case for further factual hearings.

IV

In conclusion, the record demonstrates that the district court evaluated the Agency's 1978 plan, although it did consider newer Agency and county-wide plans. The relevant plan, of course, is the one the Agency applied to the allegedly adverse employment decision. I would have remanded this case for the district court to reconsider the plan as an affirmative defense of the Agency under the proper allocation of burdens discussed above. The district court then should have reviewed the aspects of the appropriate plan under a detailed *Weber* analysis to create an appropriate record for review. *See Parker,* 652 F.2d at 1020; *cf. Pullman-Standard v. Swint,* 456 U.S. 273, 291 (1982) (when "a district court has failed to make a finding because of an erroneous view of the law, . . . there should be a remand for further proceedings to permit the trial court to make the missing findings").

I concur in the result reached by opinion because I believe that the district court erred by misallocating the burdens of persuasion and proof, and a judgment based on such a record should not stand. I cannot join this opinion, however, because I disagree with the majority's allocation of the burdens of persuasion and production, and because I believe that the district court should have the first oppor-

tunity to correct its own errors and conduct the intensive factual analysis necessary to resolve these issues. In order for the majority to uphold the plan, it has taken several unnecessary doctrinal steps that weaken the Supreme Court's test in *Weber* as interpreted by *La Riviere*. From these pronouncements, I dissent.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL E. JOHNSON,	)	
	)	
Plaintiff-Appellee,	)	No. 83-1532
	)	
v.	)	
	)	
TRANSPORTATION AGENCY, SANTA CLARA COUNTY, CALIFORNIA,	)	D.C. No. C-81-1218-WAI (SJ)
	)	
Defendant-Appellant,	)	ORDER FOR PUBLICATION
	)	
and	)	
	)	
SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 715,	)	
	)	
Intervenor-Appellee.	)	
	)	

Before: FLETCHER and FERGUSON, Circuit Judges

The majority opinion in this case, filed December 4, 1984, is amended as follows:

Slip op. at 5196, column 2:

Delete the first sentence of the third full paragraph "While the Agency . . . permanent." Replace it with the following:

> The duration of the plan, however, while subject to factfinding by the district court, is only one factor in determining that a plan "is not intended to maintain . . . [sexual] imbalance." *Weber*, 443 U.S. at 208. Permanent maintenance

is simply one potentially impermissible factor to be used in determining the validity of an affirmative action program; elimination or attainment is one permissible factor.

The Agency plan clearly aims at attainment. The district court correctly found that the plan contains no date certain or other express statement of fixed duration. The plan, however, also contains no statement that it is intended to be permanent. Enforcing it to change the male-female ratio in the skilled trades from 238 to zero, to 237 to one, clearly falls on the attainment side of the line.

Continue the paragraph with "Moreover,".

Slip op. at 5198, n.4:

Add to the end of the footnote:

An employer need not make any such showing. Thus, the district court's factual finding of no past or present discrimination against women by this employer is irrelevant to the issue of the validity of the affirmative action program.

Slip op. at 5198, column 1:

Immediately after n.4 in text, add:

"[A] judicial determination of . . . discrimination is not a prerequisite to an employer adopting voluntary, . . . [sex]-conscious remedies to comply with Title VII." *Busher v. New York State Civil Service Commission*, 733 F.2d 220, 228 n.11 (2d Cir. 1984), *cert. denied*, No. 84-336 (Jan. 7, 1985) (referring to race-conscious plans).

Slip op. at 5199, column 1:

At the end of the partial sentence at the top of the page, add footnote 5, that reads:

5. Citing Justice Blackmun's concurrence in *Weber*, the dissent contends, "Merely 'arguable' violations are not enough" to warrant affirmative

> action. The dissent misstates the law and incorrectly cites both the *Weber* plurality and Justice Blackmun's concurrence. Justice Blackmun actually wrote separately to *endorse* the theory that "voluntary affirmative action be a reasonable response to an 'arguable violation' of Title VII." 443 U.S. at 211. His position was narrower than the plurality's, not broader: "The Court, however, declines to consider the narrow 'arguable violation' approach and adheres instead to an interpretation of Title VII that permits affirmative action by an employer whenever the job category in question is 'traditionally segregated.'" 443 U.S. at 212. Two hundred and thirty eight to zero suffices to show such segregation.
>
> However, were a showing of arguable violation required, we suggest that two hundred and thirty-eight to zero suffices to show that too (were Ms. Joyce the plaintiff here, the job having gone to Mr. Johnson, the statistics would make a prima facie case of discrimination.)

Judges Fletcher and Ferguson voted to deny the petition for rehearing and to reject the petition for rehearing en banc. Judge Wallace voted to grant.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL E. JOHNSON,	)	
	)	
Plaintiff-Appellee,	)	No. 83-1532
	)	
v.	)	
	)	
TRANSPORTATION AGENCY, SANTA CLARA COUNTY, CALIFORNIA,	)	D.C. No. C-81-1218-WAI (SJ)
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Defendant-Appellant,	)	ORDER FOR PUBLICATION
	)	
and	)	
	)	
SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 715,	)	
	)	
Intervenor-Appellee.	)	
	)	

Before: WALLACE, Circuit Judge

My dissent, filed December 4, 1984, is amended by adding footnote 1, called at slip op. 5205, col. 2, first full paragraph, after "(Blackmun, J., concurring)":

1. The majority accuses me of "misstat[ing] the law and incorrectly cit[ing]" both *Weber* and Justice Blackmun's concurrence. Slip op. at 5199, n. 5. A careful reading of my dissent will demonstrate no misstatement of the law.

   It is true that Justice Blackmun concluded that the *Weber* plurality rejected an "arguable violation" approach in favor of a "traditional segregation" approach. This, however, is precisely my point—that *more* than an "arguable violation" is required. By using the term "*tradition-*

ally segregated job categories," *Weber*, 443 U.S. at 209 (emphasis added) (footnote omitted), the Court incorporated a requirement that a showing of past discrimination must be made. *See Janowiak v. City of South Bend*, 750 F.2d 557, 562 (7th Cir. 1984).

Not only have I correctly cited the law but, to the extent that the majority opinion holds that a mere statistical disparity suffices to show that a job category was "traditionally segregated," it is contrary to both *Weber* and *Janowiak*. Although one may argue whether a finding of two hundred and thirty-eight males to one female suffices to show sex-based segregation, the ratio alone is insufficient to show a pattern of *traditional* sex-based segregation.

No. 85-1129

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1985

PAUL E. JOHNSON,
Petitioner,

vs.

TRANSPORTATION AGENCY, SANTA CLARA COUNTY, CALIFORNIA, and SERVICE EMPLOYEES INTERNTIONAL UNION LOCAL 715,
Respondents.

RESPONDENT TRANSPORTATION AGENCY'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

May an employer consider gender as a factor in promoting a qualified woman where none of 238 persons employed in the job category were female and where the employer's voluntary affirmative action plan set no quotas, but permitted gender to be a factor in employment decisions until such time as the employer's workforce is representative of the local area labor force?

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TRANSPORTATION AGENCY, SANTA CLARA COUNTY, CALIFORNIA, and SERVICE EMPLOYEES INTERNTIONAL UNION LOCAL 715,

Respondents.

RESPONDENT TRANSPORTATION AGENCY'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Respondent Transportation Agency, Santa Clara County, California, hereinafter referred to as "Agency," respectfully submits this brief in opposition to the petition for writ of certiorari, which was received on January 6, 1986.

STATEMENT OF THE CASE

I. Facts and Background

Petitioner Paul Johnson brought this action in the United States District Court for the Northern District of

California alleging that he was a victim of "reverse discrimination" when the respondent Santa Clara County Transportation Agency (Agency) promoted Diane Joyce, a qualified woman with many years of Agency experience. The Agency considered her gender as a factor supporting her promotion in view of statistics that none of 238 employees in the skilled craft job category were female.

During the spring of 1980 the Agency had a vacancy for the position of Road Dispatcher. Road Dispatchers assign crews, equipment and materials to various road maintenance jobs, and maintain various records concerning the status of workers, materials and equipment. The Agency established minimum qualifications for the position of Road Dispatcher as follows: four years of previous dispatch experience or four years of road maintenance work with the County of Santa Clara. (Pet. App. 18a)

On April 29, 1980, an oral board rated nine applicants for the position of Road Dispatcher. Seven of the applicants received passing ratings: Mr. Kinnear ranked first with a rating of 80. Petitioner Paul Johnson was tied for second with a rating of 75. Diane Joyce was third with a rating of 73. (Pet. App. 18a)

A subsequent oral interview was held by employees of the Roads Division of the Transportation Agency and resulted in a recommendation that petitioner Johnson be hired.[1] (Pet. App. 11a, 19a)

---

[1] One of the participants at the second oral interview, Mr. Baldanzi, testified that he regarded Joyce as "rabble rousing," "skirt wearing," "not a lady." (RT 153, 161) This participant testified that Joyce had only 1½ or 2 years of road maintenance work experience (as opposed to her actual experience of 5 years).

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Diane Joyce was selected by James Graebner, the Agency's Director, who, pursuant to the Agency's civil service rules, had discretion to appoint any of the top seven persons on a qualified list. (Pet. App. 4a) Graebner concluded that Johnson and Joyce were equally qualified for the position of Road Dispatcher. (Pet. App. 3a)

Prior to her promotion, Diane Joyce worked for almost five years as a Road Maintenance Worker performing a wide spectrum of "hands on" road maintenance jobs on various County roads. In addition, Joyce had 18 years of prior clerical experience, including 3-½ years as Road Yard Clerk. While employed as a Road Yard Clerk, Joyce regularly performed the functions of the Road Dispatcher part time.

Petitioner Johnson had two years of road maintenance work experience primarily related to work on bus stops, plus 11 years as a Road Yard Clerk for the County's Transportation Agency. Johnson worked for several months "out of class" as a Road Dispatcher without competing with others for the "out of class" assignment. Prior to his employment by the County, Johnson worked with a private aggregates company performing some road dispatch duties.

Agency Director Graebner also considered Joyce's gender to be a factor in support of her selection, in view of the historic pattern of employing almost no women in the Agency's Roads Division. None of the Agency's 238 skilled craft positions was held by a woman. (Pet. App. 19a, 26a, 27a)

The Agency's Affirmative Action Plan provided for consideration of gender as part of the hiring process where

women were underrepresented in certain job classifications. The plan recognized that "past practices" of discrimination may have occurred, without specifying any particular prior discriminatory practice. The plan established no quotas for hiring in any job classification. However, the plan stated that there is a long range goal of having the percentage of women in each job classification be the same as the women in the available labor market.[2] The plan acknowledged that it will be extremely difficult to significantly increase the representation of women in technical and skilled craft job classifications where they have been traditionally underrepresented. (Pet. App. 19a)

II. Decisions Below

The District Court found that the gender of Joyce was "*the determining factor*" in her selection (Pet. App. 4a) and rejected the Agency's defense that it was permissible to consider gender in view of statistics which showed a striking gender imbalance (0 women out of 238 skilled craft workers) which the Agency's affirmative action plan sought to remedy. The District Court ruled that the Agency failed to sustain its burden of proof that the affirmative action plan was a *temporary* measure within the meaning of *United Steelworkers of America v. Weber* 443 U.S. 193 (1979). (Pet. App. 6a-8a) The Plan "had no end date . . ." (Pet. App. 13a)

The Ninth Circuit reversed. *Johnson v. Transportation Agency, Santa Clara County, et al.*, 748 F2d 1308 (9th

---

[2] At the time of trial, the Transportation Agency's Affirmative Action Plan was a one-year plan effective January 1, 1982, and stated a goal of only three out of 55 skilled craft openings to be filled by females.

Cir 1984). The Ninth Circuit held that the Agency had met its burden[3] of demonstrating that its plan was temporary, remedial and met the purposes of Title VII:

First, the Ninth Circuit concluded that the Agency plan was a temporary measure: "unlike the district court, we believe that this emphasis upon the 'attainment' of a representative work force does 'have the effect of ending preferential treatment to women' once parity is achieved." (Pet. App. 24a)

Second, the Ninth Circuit concluded that the Agency plan was remedial:

> "The promotion of Joyce to the road dispatcher position aptly served the Agency plan's remedial purpose. Statistics contained in the plan show that not one of the Agency's 238 skilled craft workers was a woman. Included in the skilled craft category are mechanics, body and fender repairers, construction inspectors, road maintenance workers, and road dispatchers. A plethora of proof is hardly necessary to show that women are generally underrepresented in such positions and that strong social pressures weigh against their participation. The promotion of Joyce was a lawful attempt to remedy the conspicuous imbalance." (Pet. App. 27a)

> "Statistics are extremely useful in showing a conspicuous work force imbalance. We note particularly the difficulty that may confront an employer whose plan

---

[3] The Ninth Circuit observed that "the district court's opinion is not entirely clear as to whether it unappropriately placed the burden of persuading the court of the plan's validity on the employer." Whether the employer has a burden of persuasion or merely a burden of production is not material: the Ninth Circuit held that the Agency "has met the higher burden." (Pet. App. 30a)

is intended to remedy discrimination resulting from societal norms. Some forms of discrimination are so subtle or so accepted that they defy proof other than by statistics. In *Weber,* the exclusion of blacks from craft unions was so pervasive as to warrant judicial notice. *Weber,* 443 U.S. at 198 n. 1." Pet. App. 26a-27a)

Third, the Ninth Circuit concluded that the Agency plan would not bar men from promotional opportunities:

"The plan does not indicate, however, that other employees will be barred or that their interests will be unnecessarily infringed. In fact, as in *Weber,* the plan contemplates the expansion of opportunity for all. Shortly before the plan was adopted, the county approved 734 new Agency positions to support the expansion of the county bus fleet from 236 to 516 buses. The plan notes that '[a]s the County Transit System continues to expand, additional positions will need to be authorized.'

Johnson argues that the selection of Joyce as road dispatcher served as a complete bar to his selection for the position. We reject this narrow view. . . . When there is but one opening, the selection of one candidate will necessarily result in exclusion of all others. Unless we are shown a distinct pattern of exclusion of non-minority candidates from such positions, we cannot conclude that a single employment decision serves as a bar or unnecessarily trammels the interest of other employees. The record contains no evidence of such a pattern in this case. Pursuant to the Agency plan, Joyce's sex was viewed as an additional positive factor in an otherwise qualified candidate. The fact that her sex may have been the decisve factor in the selection of a woman for this particular opening does not indicate that men will always be excluded."[4] (Pet. App. 28a-29a)

---

[4] Indeed, an additional Road Dispatcher position has been added by the Agency since 1982, and both petitioner Johnson and Diane Joyce have been promoted.

Finally, the Ninth Circuit concluded that the promotion of Joyce was a lawful effort to remedy an entrenched pattern of manifest imbalance and consistent with the remedial purposes of Title VII.

REASONS FOR DENYING CERTIORARI

I. THE DECISION OF THE NINTH CIRCUIT IS CONSISTENT WITH THE STANDARDS SET FORTH BY THIS COURT IN UNITED STEELWORKERS OF AMERICA v. WEBER, 443 U.S. 193 (1979) AND PRESENTS NO FACTS WHICH WOULD GIVE RISE TO A NEW ISSUE REQUIRING REVIEW BY THIS COURT.

There is no dispute that gender was an additional positive factor in the Agency's decision to promote Diane Joyce. The question is whether or not it was permissible to consider gender, given statistics which show a striking gender imbalance in the Agency's workforce.

Standing alone, statistics that none of 238 skilled craft workers are female is evidence of discrimination against women. As this Court stated in *International Brotherhood of Teamsters v. U.S.*, 431 U.S. 324 at 340 n. 10 (1977):

> "Statistics showing racial or ethnic imbalance are probative in a case such as this one only because such imbalance is often a telltale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a workforce more or less representative of the racial and ethnic composition of the population in the community from which employees are hired."

In *Weber,* the *employer* determined that there was a "conspicuous racial imbalance," and this Court took judicial notice of the historic exclusion of blacks from craft unions. (*Weber,* 443 U.S. at 198 n. 1) *Weber* did not require proof of purposeful discrimination by the employer as a prerequisite for an affirmative action plan designed to remedy a conspicuous imbalance. In *Weber,* only 1.83% of the employer's skilled craft workers were black, in contrast to 39% black local labor force.

Here, as in *Weber,* the *employer* Agency made findings of imbalance. It determined that there were "entrenched patterns in hiring and promotion" of women, especially in skilled craft jobs such as road dispatcher. Here, the statistics showed greater imbalance than in *Weber: none* of 238 skilled craft workers was female.

This Court has consistently approved race or gender conscious plans designed to "abolish traditional patterns" of discrimination. *Weber,* 443 U.S. at 204, *Fullilove v. Klutznick,* 448 U.S. 448 (1980); *Regents of the University of California v. Bakke,* 438 U.S. 265, (1978); *United Jewish Organizations v. Carey,* 430 U.S. 144, (1977); *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, (1971); *McDaniel v. Barresi,* 402 U.S. 39, (1971); *North Carolina Board of Education v. Swann,* 402 U.S. 43, (1971). As Justice Blackmun emphasized in his concurring opinion in *Weber,* 443 U.S. at 213-14, a preferential hiring plan which seeks to remedy an historic or traditional statistical imbalance is reasonable and consistent with Title VII.

The remedy chosen here was to consider female gender as an additional positive factor in the promotion

process. This is similar to the remedy approved in *Bakke*, wherein this Court held that race could be used as a positive factor to be considered in school admissions process.

Moreover, the remedy chosen here is less intrusive upon the majority than plans such as *Weber* where there are quotas or other rigid preferences.

II. THE DECISION OF THE NINTH CIRCUIT IS NOT IN IRRECONCILABLE CONFLICT WITH SEVENTH CIRCUIT DECISIONS.

The Petitioner contends that the Ninth Circuit *Johnson* decision cannot be reconciled with *Janowiak v. Corporate City of South Bend*, 750 F2d 557 (7th Cir 1984), petition for cert. filed 53 U.S.L.W. 3896 (U.S. June 10, 1985). The petitioner reads *Janowiak* to disapprove affirmative action plans based solely upon a statistical disparity and reads *Johnson to* approve a plan based solely on statistics.

The petitioner misreads both cases. In *Janowiak*, the Seventh Circuit disapproved a racial preference hiring plan which had been approved by the district court on *summary judgment* based solely upon statistics which showed racial imbalance. A factor crucial to the *Janowiak* decision was that there was contrary evidence before the district court that two public task forces found *no* discrimination in the employer's hiring policies. This factual dispute could not be resolved by summary judgment. *Janowiak*, 750 F2d at 558-0, 562-3.

In contrast, the Ninth Circiut carefully reviewed the entire trial record in *Johnson* and concluded the Agency plan served a remedial purpose consistent with Title VII.

Janowiak has been carefully distinguished by a subsequent Seventh Circiut decision which is consistent with *Johnson.* In *Britton v. South Bend Community School Corp.,* 775 F2d 794 (7th Cir 1985), the Seventh Circuit stated that "*Janowiak* does not purport to require a finding of past discrimination for an affirmative action plan in a traditionally segregated job category to survive a Title VII challenge." 775 F2d at 805, n. 13. In *Britton,* the Seventh Circuit upheld a no minority layoff provision based primarily upon statistical disparities between black teachers (10.4%) and blacks in the community (22%), as well as upon findings by administrative bodies that the employer had discriminated in the past. Interestingly, the Seventh Circiut would not have required the administrative findings of past discrimination: "we would not hesitate to follow the Supreme Court's lead and take judicial notice of the fact that teaching is a 'traditionally segregated job category.' " 775 F2d at 805

The Ninth Circuit has taken a similar approach: In *Johnson,* it commented that an employer "need not show its own history of purposeful discrimination." (Pet. App. 26a) In *Johnson,* the statistics were compelling (no women out of 238 skilled craft workers); and the Ninth Circuit concluded that the district court should not have required an employer to show its own history of discriminatory practices. (Pet. App. 31a)

In *Britton,* "presumably the employer is itself competent to make a finding of past discrimination, for instance, *by determining that the job category is 'traditionally segregated.'* " 775 F2d 803, n. 12. In *Johnson,* the Agency had never hired a female road dispatcher, had no women skilled craft workers, and found that such positions have traditionally excluded women.

In short, the Seventh and Ninth Circuits are not in conflict with respect to the significance of statistics as support for affirmative action plans.

———o———

CONCLUSION

For the reasons set forth herein, the petition for a writ of certiorari should be denied.

Dated: February 3, 1986.

Respectfully submitted,

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County Counsel

STEVEN WOODSIDE
Chief Assistant

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Transportation Agency

FILED
MAR 6 1986
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 85-1129

In The
Supreme Court of the United States
October Term, 1985

PAUL E. JOHNSON,
Petitioner,

v.

TRANSPORTATION AGENCY, SANTA CLARA COUNTY, CALIFORNIA, and SERVICE EMPLOYEE INTERATIONAL UNION LOCAL 715,
Respondents.

PETITIONER'S REPLY

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5PP

PAUL JOHNSON WAS THE BEST QUALIFIED CANDIDATE, BUT HE LOST HIS PROMOTION SOLELY ON ACCOUNT OF HIS SEX.

This Reply Brief is tendered for one reason: to insure that the facts of this case remain as clear in the briefs as they appear in the record.[1] Respondents attempt to justify their treatment of Paul Johnson by arguing that the candidates were equally qualified and thus, the sex of the candidates could be considered as an additional factor. Then, the Respondent attempts to show that the second oral board was prejudiced against women, or at least Diane Joyce. Finally, Respondent seems to argue that the case is moot, although the issue is never clearly identified. None of these arguments find any support in the record.

Respondents[2] assert that Johnson and Joyce were equally qualified and therefore, it was permissible to use sex as "an additional positive factor" in the decision to promote Joyce to the position of Road Dispatcher. [Resp. at 7.] The record does not support this construction.

The qualifications of Johnson and Joyce were not equal. Paul Johnson was twice selected as the better qualified candidate when compared to Diane Joyce. [Pet. App. 18-19a.] Moreover, the second oral board unanimously selected Johnson as the *best* qualified candidate. RT. 159 (Testimony of James Baldanzi), RT. 166 (Testimony of Clyde Davis). The trial court, after hearing the evidence and judging the credibility of the witnesses, determined

---

[1]Petitioner stands on the legal discussion of a conflict among the circuits, as described in the Petition for Certiorari, pp. 7-10.

[2]The Brief in Opposition to the Petition for Certiorari, filed by the Santa Clara County Transportation Agency, is herein referred to as Resp.

that Paul Johnson was the best qualified as a matter of fact and law. [Pet. App. 12a (Findings of Fact, ¶ 18, Conclusions of Law, ¶ 3).]

Having ignored the record, Respondents intimate that Johnson's selection was the result of "chauvinistic" attitudes toward Diane Joyce, rather than an objective decision based on Johnson's superior qualifications. [Resp. at 2, n.1.] Respondent's interpretation is unsupported in the record, as well as being legally irrelevant. The issue here is not whether the oral board discriminated against Diane Joyce on the basis of her sex, by recommending Paul Johnson for promotion. The issue is whether the County of Santa Clara discriminated against Paul Johnson, by promoting Diane Joyce solely on account of her sex.

Even if Respondent's argument concerning sex bias were relevant, it is clear that the examination process was fair to all. Two of the three men who served on the second oral interview board were called to testify before the district court. James Baldanzi admitted that he viewed Diane Joyce as a "rebel-rouser" due to her union activities—not her sex. RT. 153. He also testified under examination by counsel for the County that he kept his personal view out of the interview and selection process. *Id.* Indeed, the Respondent failed to show any sex bias on the part of any member of the oral board, as demonstrated by the testimony of Clyde Davis.

> [MR. WOODSIDE]: YOU DID KNOW MOST OF THE CANDIDATES BEFORE THE INTERVIEW PROCESS, CORRECT?
>
> [MR. DAVIS]: YES, I KNEW ALL OF THEM.
>
> [MR. WOODSIDE]: YOU KNEW THEM ALL? DID YOU HAVE ANY PRECONCEIVED NOTIONS AS TO DIANE JOYCE'S SUITABILITY FOR THE JOB OF ROAD DISPATCHER?

[MR. DAVIS]: I DID NOT.

[MR. WOODSIDE]: DID YOU HAVE ANY—YOU INDICATED IN RESPONSE TO QUESTIONS AS TO HER GENDER THAT HER GENDER WAS APPARENT. CAN YOU EXPLAIN THAT?

[MR. DAVIS]: YES. SHE'S A FEMALE.

[MR. WOODSIDE]: WAS IT APPARENT—WAS THAT, IN ANY WAY, UNUSUAL, OR DID THAT STRIKE YOU AS BEING A FACTOR IN YOUR DECISIONMAKING?

[MR. DAVIS]: NOT IN THE LEAST.

[MR. WOODSIDE]: WHAT ABOUT HER UNION ACTIVITY?

[MR. DAVIS]: THAT AFFECTED ME NOT IN THE LEAST.

RT. 172-173. The trial court found as a matter of fact that the selection process was fair in all respects. [Pet. App. 12a (Findings of Fact, ¶ 18).] The appellate court agreed. [Pet. App. 20a.]

Respondents finally argue that there is no longer an injury to Paul Johnson because both he and Diane Joyce have been promoted.[3] [Resp. at 6, n.4.] Paul Johnson's promotion and recent retirement do not end the matter, however. His retirement benefits, through the public Employment Retirement System, are based upon his salary during the last three years of his employment with the County. If the decision of the Ninth Circuit stands, then the County may have to reclassify his benefits to reflect a lower grade.

———o———

[3]Mr. Johnson was promoted pursuant to district court's decision.

CONCLUSION

Paul Johnson's situation is not atypical or unique. This Court should act to clarify the law of affirmative action, to insure that no person suffers the discriminatory treatment that Paul Johnson received, in the name of affirmative action. Moreover, there is a clear conflict among the Circuits which can only be resolved with this Court's guidance. For these reasons the Supreme Court should grant this Petition for a Writ of Certiorari.

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Supreme Court, U.S.
FILED
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CLERK

No. 85-1129

In The
Supreme Court of the United States
October Term, 1985

PAUL E. JOHNSON,
Petitioner,

v.

TRANSPORTATION AGENCY,
SANTA CLARA COUNTY CALIFORNIA, and
SERVICE EMPLOYEES INTERNATIONAL UNION
LOCAL 715,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX

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Petition for Certiorari Filed December 31, 1985
Certiorari Granted July 7, 1986

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DOCKET ENTRIES (N.D. Calif.)

1981

Date	NR.	Proceedings	81-1218 WHO
Mar 20	1	COMPLAINT - Issued	DD 3/19/81
Apr 21	4	ANSWER TO COMPLAINT by defendant	
May 20	9	ORDER: Case transferred to San Jose, California	WHO
20	13	REASSIGNMENT ORDER: Reassigned to Judge Ingram, San Jose.	WWS

1982

Apr 26	21	Joint Pretrial Statement	
May 12	23	TRIAL MINUTES: of 5/7 & 5/12, 1982; Court trial. C/r-B Dole	WAI
Jul 23	36	FINDINGS OF FACT AND CONCLUSIONS OF LAW	WAI
Aug 10	37	JUDGMENT	
Aug 20	41	Defendant's memo in support of the motion for reconsideration and/or rehearing	
Sep 24	43	Defendant S.E.I. UNION LOCAL No. 715 Motion to intervene. Hearing set for 10/25/82 at 10:00 a.m.	
24	45	Declaration of K. Sermersheim in support of motion for intervention.	
27	54	ORDER: of 10-25-82, Defendant's motion for rehearing and/or new trial is Denied.	WAI
25	55	ORDER: of 10-25-82, Local No. 715 may intervene in this action solely for purposes	

			of arguing the motion for new trial and participating in any appeal if taken by the County of Santa Clara, and for no other purpose.
Dec	23	60	Defendant Santa Clara County Transportation Agency NOTICE OF APPEAL, from the judgment filed on 8-10-82, order denying the motion for rehearing filed 10-27-82 and stipulation and order permitting the filing of appeal by 12-27-82, fee paid.
1983			
Jan	4	62	USCA Docket number 83-1532.

The Judgment, Findings of Fact, and Conclusions of Law, entered by the District Court on August 10, 1982 and July 23, 1982 respectively, appear at pp. 1a-16a of the Appendix to the Petition for Writ of Certiorari.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT 83-1532

D.C. No. C-81-1218-WAI (SJ)

D.C. Judge William A. Ingram

Notice of appeal filed Dec. 23, 1982

PAUL E. JOHNSON,

Plaintiff-Appellee,

vs.

TRANSPORTATION AGENCY, SANTA CLARA COUNTY, CALIFORNIA,

Defendant-Appellant

and

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 715,

Intervenor-Appellee

Date	Filings-Proceedings	
1983		
Jan 19	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSELS	egm
June 6	FILED CERTIFICATE OF RECORD (6/3/83)	gb
June 20	Filed Orig & 15 Aplt's Opening briefs (12 pgs) and 5 Excerpts. 6/20	ogm
June 20	Filed Joinder of Intervenor Service Employees Int'l Union Local 715 in the brief of the appellant. 6/17	ogm
Jul 25	Filed orig. & 15 aple's briefs. (16 pgs.) & 5 supplemental excerpts. 7/25	—ot—
1984		
Feb. 14	ARGUED & SUBMITTED TO: WALLACE, FLETCHER, FERGUSON, CJJ	—jm

DEC 4	ORDERED OPINION FILED (FLETCHER) JUDGE WALLACE CONCURRING & DISSENTING & JUDG TO BE FILED & ENTD.	—vt—
DEC 4	FILED & ENTD JUDGMENT	—vt—
DEC 21	Filed aple petition for rehearing and suggestion for rehearing en banc.	
1985		
Sep 05	Filed Order (FLETCHER & FERGUSON) The majority opinion in this case, filed Dec. 04, 1984, is amended as follows: (SEE CASE FILE) Filed Order (WALLACE) His dissent, filed Dec. 04, 1984, is amended as follows: (SEE CASE FILED) So amended the petition for rehearing is denied and the suggestion for rehearing en banc is rejected.	—ot—

The Opinion of the Ninth Circuit Court of Appeals, as modified at the Denial of Rehearing, appears at pp. 17a-52a of the Appendix to the Petition for Writ of Certiorari.

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NO. C81-1218 WHO

PAUL E. JOHNSON,

Plaintiff,

vs.

TRANSPORTATION AGENCY,
SANTA CLARA COUNTY,
CALIFORNIA,

Defendant.

COMPLAINT
(Civil Rights)
(Filed March 20, 1981)

I

JURISDICTION

1. Jurisdiction of this Court is invoked pursuant to 28 USC §§ 1337 and 1343(4) and 42 USC § 2000e-5(f)(3). This is an action to secure protection and to redress deprivation of rights secured by Title VII of the Civil Rights Act of 1964, 42 USC §§ 2000e-2000e-17 providing for injunctive and other relief against discrimination in employment.

II

ADMINISTRATIVE PREREQUISITE

2. Plaintiff PAUL E. JOHNSON filed a timely charge against Defendant TRANSPORTATION AGENCY, SANTA CLARA COUNTY with the Equal Employment Opportunity Commission, which has issued its right to sue notice, the original of which is attached hereto as Exhibit "A" and is incorporated by reference herein.

III

PLAINTIFF

Plaintiff PAUL E. JOHNSON, a male, has been employed by Defendant for approximately thirteen years and currently is employed by Defendant in the job category of Road Maintenance Worker.

IV

DEFENDANT

Defendant TRANSPORTATION AGENCY, SANTA CLARA COUNTY, is a transit district established, maintained, controlled and managed by the County of Santa Clara, which is a political subdivision of the State of California.

V

STATEMENT OF FACTS

a. Plaintiff PAUL E. JOHNSON has been employed by Defendant since approximately 1967. During this time, Plaintiff has had a number of job titles and has worked as a relief road dispatcher.

b. From approximately September, 1979 to June, 1980 Plaintiff worked temporarily as road dispatcher.

c. In May, 1980, an oral examination was given for the permanent position of road dispatcher. Plaintiff took the oral examination for road dispatcher but was not awarded the position of road dispatcher.

d. Instead, a female was awarded the permanent position of road dispatcher despite the fact that she did not score as high on the examination and despite the fact that she was not qualified for the position according to the job description prepared by Defendant.

VI

CAUSE OF ACTION

Plaintiff PAUL E. JOHNSON contends that Defendant failed to award him the permanent position of road dispatcher because he is a male, in violation of 42 USC § 2000 et seq.

WHEREFORE, Plaintiff prays that this Court:

(1) Assume jurisdiction of this case;

(2) Enter a declaratory judgment that Defendant discriminated against Plaintiff on the basis of his sex;

(3) Enjoin Defendant from further discriminatory acts and practices against Plaintiff;

(4) Award Plaintiff back pay and all other forms of compensation and benefits to which he is entitled;

(5) Award Plaintiff costs of suit and reasonable attorney's fees;

(6) Grant Plaintiff such other and further relief as the Court deems just and proper.

Dated: March 19, 1981

GRUBER, DAWSON & PREEFER

By /s/ James L. Dawson
Attorney for Plaintiff

NOTICE OF RIGHT TO SUE
WITHIN 90 DAYS

March 10, 1981

CERTIFIED MAIL

Mr. Paul E. Johnson
c/o James L. Dawson, Esquire
Gruber, Dawson & Preefer
Attorneys at Law
778 North First Street
San Jose, California 95112

Re: EEOC Charge Against Santa Clara County Transportation Agency
No. 104800264

Dear Mr. Johnson:

Because you filed the above charge with the Equal Employment Opportunity Commission, and more than 180 days have elapsed since the date the Commission assumed jurisdiction over that charge, and no suit based thereon has been filed by this Department, and because you through your attorney have specifically requested this Notice, you are hereby notified that you have the right to institute a civil action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, *et seq.*, against the above-named respondent.

If you choose to commence a civil action, such suit must be filed in the appropriate United States District Court within 90 days of your receipt of this Notice.

We request that you send this Department a copy of any complaint initiating suit.

The investigative file pertaining to your case is located in the EEOC Area Office, Crocker Plaza Building, 84 West Santa Clara, San Jose, California 95113.

This Notice should not be taken to mean that the Department of Justice had made a judgment as to whether or not your case is meritorious.

Sincerely,

James P. Turner
Acting Assistant Attorney General
Civil Rights Division
/s/ Herbert A. Goldsmith, Jr.
Attorney
Federal Enforcement Section

cc: EEOC Area Office

EXHIBIT "A"

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C81-1218 WHO

PAUL E. JOHNSON,

Plaintiff,

vs.

TRANSPORTATION AGENCY, SANTA CLARA COUNTY, CALIFORNIA,

Defendant.

ANSWER TO COMPLAINT
(CIVIL RIGHTS)
(Filed April 21, 1981)

Defendant TRANSPORTATION AGENCY OF THE COUNTY OF SANTA CLARA answers the complaint on file herein as follows:

I

The allegations contained under the titles "Jurisdiction" and "Administrative Prerequisite" are neither admitted nor denied as they constitute legal conclusions.

II

Defendant admits the allegations contained in paragraphs III and IV of the complaint.

III

Defendant admits the allegations contained in paragraph V(a), V(b) and V(c) of the complaint.

IV

Defendant admits that a female person was awarded the permanent position in question herein but denies each and every, all and singular, the other allegations contained in paragraph V(d) of the complaint.

V

Defendant denies the allegations contained in paragraph VI of the complaint.

FIRST SEPARATE DEFENSE

Plaintiff's complaint fails to state a claim upon which relief can be granted.

SECOND SEPARATE DEFENSE

The Court lacks jurisdiction over the subject matter of the action.

THIRD SEPARATE DEFENSE

The person selected to perform the position has equal qualifications to do the work as plaintiff.

FOURTH SEPARATE DEFENSE

Defendant contends that it has not discriminated against plaintiff because he is male.

FIFTH SEPARATE DEFENSE

Defendant acted legally in affirmatively placing women in positions traditionally held by males.

WHEREFORE, defendant prays that:

1. The Court not take jurisdiction of this case;
2. Plaintiff take nothing by way of his complaint; and
3. Such other and further relief as the Court deems proper.

Dated: April 21, 1981.

SELBY BROWN, JR., County Counsel
ANN MILLER RAVEL, Deputy

By /s/ Ann Miller Ravel
Attorneys for Defendant

AMR:bc

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CASE NO: C81-1218 WAI (SJ)

PAUL E. JOHNSON,

Plaintiff,

vs.

TRANSPORTATION AGENCY, SANTA CLARA COUNTY, CALIFORNIA,

Defendant.

JOINT PRE TRIAL STATEMENT

(A) PARTIES: Plaintiff, by and through their attorneys, GRUBER, DAWSON & PREEFER, JAMES L. DAWSON, and defendant, by and through its attorneys, Office of the County Counsel, STEVEN WOODSIDE submit the following Joint Pre Trial Statement pursuant to LR235-7 and the Order of this Court.

(B) JURISDICTION AND VENUE: Jurisdiction is based upon 28 USC §§ 1337 and 1343(4) and 42 USC § 2000e-5(f)(3). The action was transferred to San Jose pursuant to LR105-2(c). The challenged employment practice was carried out in the Northern District of California. There is no dispute concerning jurisdiction or venue.

(C) PLAINTIFF CONTENDS: That he was discriminated against on the basis of his sex in that he was

not promoted to the position of Road Dispatcher despite the fact that he was the most qualified candidate for the position on the basis of his background, experience, and oral examination scores. Plaintiff believes that the reason he was not promoted to the position of Road Dispatcher was because of an Affirmative Action Plan.

DEFENDANT CONTENDS: That while plaintiff was qualified for the position of Road Dispatcher that the individual who was promoted to the position, a female, was equally qualified, that under the Merit System Rules of Santa Clara County (Civil Service Rules) the Transportation Agency Director had the discretion to appoint from a list of qualified individuals. Defendant further contends that sex was not the prime factor in the selection but was a proper consideration in light of the historic underrepresentation of female employees in the Transportation Agency as a whole and in the job category of Road Dispatcher in particular.

(D) UNDISPUTED FACTS: There is general agreement as to the sequence of events leading up to the promotion at issue in this action. In late December, 1979, a promotional opportunity announcement was posted for the position of Road Dispatcher. Plaintiff, and a number of other individuals, including the individual who was ultimately appointed to the position of Road Dispatcher, filled out a written application form.

On April 24, 1980, an oral board consisting of two individuals (Mr. Estruth, Ms. Barnes), interviewed nine individuals, seven of whom scored seventy (70) and above and were therefore certified as eligible for the position of Road Dispatcher.

Plaintiff scored seventy-five (75) and Diane Joyce, the individual who was ultimately promoted, scored seventy-two point five (72.5), which was apparently rounded up to seventy-three (73).

A second oral board, or interview, was then conducted by individuals employed within the Road Operations Division of the Transportation Agency. The seven individuals who passed the first oral board participated in the second, departmental oral board. Plaintiff was the individual recommended by the second oral board to be appointed to the position of Road Dispatcher.

During the selection process, Diane Joyce contacted Ms. Helena Lee, Women's Coordinator, Santa Clara County, and informed Ms. Lee of the promotional opportunity. Ms. Lee then contacted Mr. Victor Morton, then Affirmative Action Coordinator of the Transportation Agency, and informed Mr. Morton that Diane Joyce had applied for the promotion.

Mr. James Graebner, Director of the Transportation Agency, after discussing the promotional opportunity with Mr. Morton and with Mr. Ronald Shields, Road Operations Division Director, appointed Diane Joyce to the position of Road Dispatcher.

(E) DISPUTED FACTS:

PLAINTIFF CONTENDS that he was the most qualified individual applicant for the position of Road Dis-

patcher and that he was denied the promotion because of his sex, male.

Plaintiff further contends that he was not promoted because of the interpretation and implementation of an Affirmative Action Plan which was not justifiable under the circumstances surrounding this promotion.

DEFENDANT CONTENDS that plaintiff was not denied the promotion because of his sex in that sex was not the prime factor in the selection but was a proper consideration and within the discretion of the appointing authority under the circumstances.

Defendant further contends that in the event that there is a factual finding that plaintiff was denied the promotion on the basis of sex that a legal issue may remain as to whether the Affirmative Action Plan of the Transportation Agency justified the action to promote the female applicant.

(F) RELIEF PRAYED: Plaintiff requests a declaratory judgment that he was discriminated on the basis of his sex in violation of Title VII of the Civil Rights Act of 1964;

Plaintiff further requests that he be awarded the position of Road Dispatcher and that he be awarded back pay and all other benefits that he would have had if he had been promoted to the position in June, 1980;

Plaintiff further requests an Order enjoining defendant from further discriminatory acts and practices against plaintiff;

Plaintiff further requests costs of suit and reasonable attorney's fees.

(G) POINTS OF LAW:

PLAINTIFF CONTENDS that he was not promoted to the position of Road Dispatcher because of his sex, male, and that such an action by defendant is in violation of Title VII of the Civil Rights Act of 1964.

Plaintiff further contends that the application of the Transportation Agency Affirmative Action Plan was unwarranted and unjustified because of the categorization of the position of Road Dispatcher, because there has never been a finding that the Transportation Agency as a whole or the Road Operations Division in particular has discriminated against women, because of the unrealistically high "goals" in the Affirmative Action Plan as implemented and interpreted, and because plaintiff was not a mere job applicant, but was a long time employee.

DEFENDANT CONTENDS that the appointing authority has discretion to select among individuals certified to an eligible list and, that all things being equal, the promotion of a female to the position of Road Dispatcher was appropriate and within the discretion of the appointing authority given the historic underrepresentation of females in the Transportation Agency as a whole and in the position of Road Dispatcher in particular.

(I) WITNESSES TO BE CALLED: See attached Witness list.

(J) EXHIBITS, SCHEDULES AND SUMMARIES: See attached Exhibit list.

(K) FURTHER DISCOVERY OR MOTIONS: None

(L) STIPULATIONS: The parties stipulate that all documents on the attached Exhibit list were obtained from the Transportation Agency and/or County of Santa Clara.

(M) AMENDMENTS AND DISMISSALS: None are anticipated at present.

(N) SETTLEMENT DISCUSSION: The parties do not believe that settlement is likely.

(O) AGREED STATEMENT: The undisputed facts, above, may be incorporated in the trial of this matter.

(P) BIFURCATION, SEPARATE TRIAL OF ISSUES: Not requested.

(Q) REFERENCE TO MASTER: Not applicable.

(R) APPOINTMENT AND LIMITATION OF EXPERTS: Not requested.

(S) TRIAL DATE: The trial will begin on May 10, 1982.

(T) ESTIMATE OF TRIAL TIME: The trial will last approximately two days.

(U) CLAIMS OF PRIVILEGE OR WORK PRODUCT: None.

(V) MISCELLANEOUS: None.

DATED: .....

.....
JAMES L. DAWSON
Attorney for Plaintiff

DATED: .....

.....
STEVEN WOODSIDE
Attorney for Defendant

TRIAL EXHIBITS

PROMOTIONAL OPPORTUNITY
For Employees of the
COUNTY OF SANTA CLARA

General Information:

Probationary Employees may apply for Promotional Examinations, but their names will not be certified to vacancies until they have attained permanent status.

Veterans' Preference does not apply in Promotional Examinations.

Applications may be obtained from: Santa Clara County Personnel Department, County Administration Building, 70 West Hedding Street, Room 407, San Jose 95110, or Departmental Personnel Representatives.

ROAD DISPATCHER

Salary Range $880-$1,069 Monthly

Final Filing Date March 15, 1974

Time and Place of Examination To be announced

NOTE: Applications must be in the Personnel Office by 5:00 P.M. on the Final Filing Date. Postmarks are no longer acceptable.

THE POSITION

Under general supervision, a Road Dispatcher dispatches crews, equipment and materials to road maintenance jobs and maintains the current status of men, equipment and materials. He maintains records of assignments, locations, status and availability of men and equipment; maintains listings of qualifications of equipment operators and other personnel; receives by telephone or

radio, complaints and notifications of road conditions from the public, civil and law enforcement agencies and other employees, relays routine and emergency telephone or radio messages; dispatches men, crews and equipment to handle emergency problems; operates two-way radio; schedules and coordinates the equipment relocation; as directed, assigns, rotates and replaces men to fulfill job requirements; originates work orders from complaints received; records and processes daily time reports, overtime reports and materials receipts and issues; and performs related work as required.

EMPLOYMENT STANDARDS

Training and experience equivalent to graduation from high school; and four years of experience in dispatching trucks or construction equipment in a related field, or four years of road maintenance work with the County of Santa Clara.

Possession of a Restricted or higher Radio Telephone Operator's license issued by the Federal Communications Commission is desirable.

Knowledge of: Skills used in road maintenance work; types and capabilities of road maintenance and construction equipment; fundamentals of radio telephone operation.

Ability to: Keep accurate records; operate two-way radio equipment; speak clearly and distinctly; schedule and coordinate a large number of men and equipment; learn the location of roads and expressways; work cooperatively with other employees and the public.

EXAMINATION

Written Test 50%

Oral Interview 50%

A minimum rating of 70% is required for each part of the examination. According to Merit System Rules, the 70% used to represent the minimum acceptable score on the written test need not be the arithmetical 70%, but may be adjusted, based on a consideration of the difficulty of the test, the degree of competition, and the needs of the service. It is important that your application form show all pertinent training and experience you possess.

Issued 2/27/74

ROAD DISPATCHER

3/15/74—EEF $880-$1,069 Monthly

PROMOTIONAL OPPORTUNITY

For Employees of the
COUNTY OF SANTA CLARA

General Information:

Probationary Employees may apply for Promotional Examinations, but their names will not be certified to vacancies until they have attained permanent status.

Veterans' Preference does not apply in Promotional Examinations.

Applications may be obtained from: Santa Clara County Personnel Department, County Administration Building, 70 West Hedding St., East Wing Lower Level, San Jose, CA 95110 or Dept. Pers. Representative.

ROAD DISPATCHER

Salary Range $1312-1584 Effective Monthly*
Final Filing Date December 28, 1979
Time and Place of Examination To be announced

*Includes County's payment of employee's share of Social Security

NOTE: Applications must be filed at Transportation Personnel, 1555 Berger Drive, Bldg. 2, Room 103, San Jose, CA 95112 by 5:00 P.M. on the final filing date. Postmarks are no longer acceptable.

MACHINE COPIED APPLICATIONS
WILL NOT BE ACCEPTED

THE POSITION

Under general supervision, the Road Dispatcher dispatches crews, equipment and materials to road maintenance jobs and maintains status of crews, equipment and materials. Typical tasks would additionally include maintaining records of assignments, locations, status and avail-

ability of personnel and equipment; maintaining listings of qualifications of equipment operators and other personnel; receiving, by telephone or radio, complaints and notifications of road conditions from the public, civil and law enforcement agencies and other employees; relaying routine and emergency telephone or radio messages; dispatching crews and equipment to handle emergency problems; operating two-way radio; scheduling and coordinating equipment relocation; assigning, rotating and replacing personnel, as directed, to fulfill job requirements; originating work orders from complaints received; recording and processing daily time reports, overtime reports and materials receipts and issues; and performing related work as required.

APPLICATION REQUIREMENTS

Training and experience equivalent to graduation from high school; and four years of experience in dispatching trucks or construction equipment in a related field, or four years of road maintenance work with the County of Santa Clara.

Possession of a Restricted or higher Radio Telephone Operator's license issued by the Federal Communications Commission is desirable.

Knowledge of: Skills used in road maintenance work; types and capabilities of road maintenance and construction equipment; fundamentals of radio telephone operation.

Ability to: Keep accurate records; operate two-way radio equipment; speak clearly and distinctly; schedule and coordinate a large number of employees and equipment; learn the location of roads and expressways; work cooperatively with other employees and the public.

EXAMINATION

The examination will include one or more of the following parts: application review, application appraisal, written test, oral examination. If applications are received in such numbers that a competitive rating of education and experience is not possible from a review alone, those factors will be determined by a written test and/or an oral examination. If both a written test and an oral interview are required 50% of the total examination weight will be assigned to the written portion and 50% to the oral.

As a condition of appointment each employee who is not employed in a classification already covered by Local 715 must sign a modified agency shop agreement providing for the deduction of union membership dues or a service fee. A 10 working day cancellation period is provided.

Those eligibles scoring 80% or more on the examination will be certified to the department in which they are working before eligibles from other County departments.

It is important that your application show all the relevant training and experience you possess. Applications may be rejected if incomplete. Copies of all materials submitted along with application forms may not be returned to applicants.

Issued 12/12/79
Folder No. 325/9

ROAD DISPATCHER

12/28/79—SC/Transportation

$1312-1584 Effective Monthly*

SANTA CLARA COUNTY
PERSONNEL DEPARTMENT
ELIGIBLE LIST

Class Title ROAD DISPATCHER

[Promotional]

			Number
Announcement	12/12/79	Total Applications	12
Final Filing	12/29/79	Applications Accepted	9
Prom. Rating	.....	Took Written	.....
Appl. Appr.	.....	Qualified Written	.....
Written	.....	Appeared Oral	9
Oral	4/24/80	On List	7
List Prepared	4/29/80		

ORAL EXAMINING BOARD: Name Orals held at Transportation. Title

Name	P	Final Score
KINNEAR, William J.	1	80
JOHNSON, Paul E.	2	75
MITCHELL, Walter L.	2	75
JOYCE, Diane D.	4	73
JADRICH, Richard J.	5	71
MCNAY,Ronald A.	6	71
SILVA, Albert P.	7	70

ASST. DIRECTOR OF PERSONNEL ILLEGIBLE

Date Approved

PERSONNEL REQUEST AND CERTIFICATION
* * * [Material deleted—Illegible]

Date Phone	Certification of Eligibles Name - Address	Interview Results Circle One		REASONS FOR DECISION Explain 4, 5, or 6 (List critical abilities, knowledges, and skills person has or lacks)
5/16/80	DEPT PROM LIST			
	WILLIAM J. KINNEAR	1	4	This candidate has
	2775B E. Dunne Ave	2	5	knowledge of man-
779-5732	Morgan Hill, 95037	3	6	power and equip- ment needs but lacks clerical experience.
	* PAUL E. JOHNSON	1	4	Well qu[illegible]ed appli-
	3139 New Jersey Ave	2	5	cant; two years of
377-3794	SJ, 95127	3	6	R M W experience plus 11 years of Road Yard Clerk. Has had previous outside Dispatch ex- perience but was 13 years ago.
	* WALTER L. MITCHELL	1	4	This candidate is
	3072 Murtha	2	5	qualified and has
272-1389	SJ, 95127	3	6	knowledge of equip- ment and material but lacks the experi- ence in office pro- cedures required by this position.
	DIANE D. JOYCE	1	4	Well qualified by
	1450 Bernardo Ave	2	5	virtue of 18 years of
245-1311	SU, 94087	3	6	past clerical experi- ence including 3½ years at West Yard plus almost 5 years as a RMW.

Date Phone	Certification of Eligibles Name - Address	Interview Results Circle One	REASONS FOR DECISION Explain 4, 5, or 6 (List critical abilities, knowledges, and skills person has or lacks)
292-5364	**RICHARD J. JADRICH 1495 Calaveras SJ, 95126	1 2 3	4 5 6 This candidate is highly qualified but lacks the depth of e x p e r i e n c e Dispatching men and e q u i p m e n t and clerical duties of the candidate selected.
926-5610	**RONALD A. MCNAY 1667 Flickinger SJ, 95131	1 2 3	4 5 6 This candidate has little knowledge of the requirements of this position. Has some knowledge of w o r k procedures and e q u i p ment usage but has no exper. or backgrd. in office procedures.
227-6149	ALBERT P. SILVA 5958 Dunn Ave SJ, 95123	1 2 3	4 5 6 Shows no interest in this position on a full time basis.

Director of Personnel

Appointing Authority
James Graebner

KEY FOR INTERVIEW RESULTS

1 -Did not respond
2 -Responded/Waived interview
3 -Interviewed/waived
4 -Interviewed/not selected
5 -Interviewed/selected
6 -Other

* * * [Material deleted—Illegible]

Transportation Agency
County of Santa Clara

Equal Employment Opportunity Affirmative Action Plan

BOARD OF SUPERVISORS

Geraldine F. Steinberg
5th District
Chairperson, Transit District Board

Rod Diridon
4th District
Chairperson, County Board

Sig Sanchez
1st District

Dominic L. Cortese
2nd District

Dan McCorquodale
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COUNTY EXECUTIVE
William M. Siegel

DIRECTOR OF TRANSPORTATION
James H. Graebner

AFFIMATIVE ACTION COORDINATOR
Ernest Perez

AGENCY PERSONNEL OFFICER
Jan Thomas

December 18, 1978

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SANTA CLARA COUNTY AND TRANSIT DISTRICT EQUAL EMPLOYMENT OPPORTUNITY POLICY

It is the policy of the Santa Clara County and Transit District Boards of Supervisors that no person shall on the

ground of race, color, national origin, religion, sex, age or handicapped status be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity conducted by Santa Clara County.

Further, it is the policy of the County and Transit District Boards of Supervisors that no person shall be discriminated against with regard to recruitment, selection, appointment, training, promotion, retention, discipline or other aspects of employment because of race, color, national origin, religion, sex, age or handicapped status.

It is the goal of the County and Transit District to attain a work force which includes in all occupational fields and at all employment levels minorities, women and handicapped persons in numbers consistent with the ratio of these groups in the area work force.

The County and Transit District Boards of Supervisors recognize that mere prohibition of discriminatory practices is not enough to remedy the effects of past practices and to permit attainment of an equitable representation of minorities, women and handicapped persons. Affirmative, aggressive, continuing actions are required to attain this goal.

Consequently, it is the will of the County and Transit District Boards of Supervisors that the Transportation Agency take affirmative continuing action as required to assure that:

a. Employment by the Agency is kept freely open to all persons regardless of race, color, national origin, religion, sex, age or handicapped status.

b. Any possible barriers to employment and promotion of minorities, women and handicapped persons are removed.

c. Aggressive and imaginative continuing efforts are made to attract and assist minorities, women and handicapped persons to qualify for employment and promotion as needed to attain an equitable representation in all occupational fields and at all job levels.

d. Bilingual and bicultural persons are recruited, selected and employed in all job classifications as needed to provide equitable service to all bilingual, bicultural segments of the community with special emphasis toward the County's Spanish-speaking residents and other large identifiable groups.

The attached Santa Clara County Transportation Agency Equal Opportunity Plan outlines the actions to be taken to implement the Equal Opportunity Policy outlined above. This Plan is approved effective December 18, 1978.

/s /Rod Diridon
Chairperson
Santa Clara County
Board of Supervisors

/s/ Geraldine F. Steinberg
Chairperson
Santa Clara County
Transit District

FOREWORD

SANTA CLARA COUNTY TRANSPORTATION AGENCY EQUAL EMPLOYMENT OPPORTUNITY AFFIRMATIVE ACTION PLAN

The Santa Clara County Transportation Agency Equal Employment Opportunity (EEO) Affirmative Action Plan sets forth the actions to be taken to comply with the Equal Employment Opportunity Policy established by the County and Transit District Boards of Supervisors and with Urban Mass Transportation Administration EEO requirements.

The Transportation Agency Director is responsible for development and implementation of the Agency EEO Affirmative Action Plan. The Agency EEO Program, however, is an integral part of the County Affirmative Action Program. Consequently, since the County Personnel Department is charged with recruiting, testing and establishing employment lists for many of the job classifications used by the Transportation Agency, the County Personnel Department Director shares major responsibility for effective implementation of the Program.

Therefore, it is expected that the County Personnel Department and its Affirmative Action Program staff will aggressively strive to effectively carry out the personnel actions for which they are responsible essential to attainment of the objectives of the Agency EEO Program.

/s/ William M. Siegel
County Executive and
Executive Officer,
County Transit District

PREFACE

The Transportation Agency goal is to attain an Agency work force whose composition reflects the ethnic and sexual make-up of the area work force. Also, it is the Agency's goal to provide handicapped persons equitable employment and career progression opportunities within the Agency.

Presently all ethnic minority groups have an overall representation in the Agency work force that approximates or exceeds their ratio in the area work force. Significant deficiencies exist, however, in the representation of some minority groups in management, professional and technical positions. Consequently, a primary objective of the Agency Equal Employment Opportunity (EEO) Affirmative Action Plan will be to correct these deficiencies.

Women are underrepresented in total numbers in the Agency work force and in a number of major job categories. Therefore, a priority objective of the Agency EEO Affirmative Action Plan will be to provide women the maximum possible opportunity to obtain equitable employment and career progression in the Agency's professional, technical and skilled job classifications where women have not been traditionally employed and where they are presently underrepresented.

To attain these goals and make Equal Employment Opportunity a reality throughout the Agency, Affirmative Action must be an integral part of the Agency's total personnel process. The Agency EEO Affirmative Action Plan identifies major personnel actions in recruitment, hiring, upgrading, training and other areas needed to attain these

goals and assigns responsibilities and establishes timetables for their accomplishment.

Primary responsibility for accomplishment of most of the personnel actions outlined in the Plan necessarily resides with the Agency Personnel Office. However, all Division Directors and supervisory personnel share significant responsibilities for implementation of the actions pertaining to their functional areas. The degree to which each Agency Division attains the Plan's objectives will provide a direct measure of that Division Director's personal commitment to the EEO Policy established by the County and Transit District Boards of Supervisors.

Effective implementation of the Plan should result in a statistically measurable yearly improvement in the hiring, training and promotion of minorities, women and handicapped persons in the major job classifications utilized by the Agency where these groups are underrepresented. At the same time, it should result in improved personnel practices that will benefit all Agency employees who may have been subjected to discriminatory personnel practices in the past. Thus, the Agency EEO Affirmative Action Plan should serve as an action guide to bring about improved personnel administration practices that result in fuller development of underutilized human resources and more efficient, effective accomplishment of the Agency's mission while making Equal Employment Opportunity a reality for all persons.

/s/ James H. Graebner, Director
Transportation Agency

SANTA CLARA COUNTY
TRANSPORTATION AGENCY
EQUAL EMPLOYMENT OPPORTUNITY
AFFIRMATIVE ACTION PLAN

December 18, 1978

PART I — GENERAL

A. *Purpose and Scope of the Plan*

1. Sets forth the Equal Employment Opportunity Policy approved by the Santa Clara County and Transit District Boards of Supervisors.

2. Provides background data pertaining to development of the Transportation Agency Equal Employment Opportunity Affirmative Action Program.

3. Presents an analysis of the composition and distribution of the existing Agency work force and establishes Equal Opportunity/Affirmative Action Employment goals for the Transportation Agency.

4. Identifies the major actions to be accomplished to carry out the Santa Clara County and Transit District Equal Employment Opportunity Policy and assigns responsibility and establishes timetables for their accomplishment.

5. Outlines actions to be taken by the Agency to assure compliance with Federal, State, and County Equal Employment Opportunity requirements by contractors and consultants involved in Agency construction, consultant, services or other projects.

B. *Plan Background*

1. On August 7, 1971, the Santa Clara County Board of Supervisors adopted an Equal Employment Opportunity Policy, subsequently established as General Personnel Policy 200. This Policy declared that:

   a. The County of Santa Clara has a clear responsibility for establishment of equal employment opportunity in a clear and positive sense at all levels of County government.

   b. As a government entity, the County should provide exemplary leadership to all other employers in the metropolitan area in making equal employment opportunity a reality for all persons.

   c. Priority attention should be given to analysis of the service needs of minority persons.

   d. Steps should be taken as necessary to recruit, train and deploy bilingual, bicultural staff to provide services equitably to all bicultural members of the community with special emphasis toward the County's Spanish-speaking residents and other large identifiable groups.

2. On October 7, 1972, the County Board of Supervisors adopted a five-year County Affirmative Action Plan.

   a. This Plan established a County Affirmative Action Program and provided guidelines for

implementation of the Equal Employment Opportunity Policy adopted by the County Board of Supervisors on August 7, 1971.

b. The Program goal was to attain by June 30, 1977, a minority and female representation in the overall County and all job classifications in keeping with the ratio of these groups in the area work force.

3. While the County made significant progress toward attainment of the County Affirmative Action Plan's employment goals, these goals were not achieved in several important areas. Consequently, the County is adopting a follow-on Affirmative Action Plan.

4. On September 8, 1975, the County Board of Supervisors approved a comprehensive Affirmative Action Plan for the Transportation Agency. This Plan incorporated the Equal Employment Opportunity Policy adopted by the Board of Supervisors on August 7, 1971. Also, it incorporated an Affirmative Action Program to assure compliance with this policy and requirements imposed by the Urban Mass Transportation Administration (UMTA) and other Federal or State Agencies. Additionally, it incorporated an Affirmative Action Program concerned with monitoring and assuring compliance by construction contractors and consultants involved in Agency projects with Federal, State and Santa Clara County Equal Employment/Affirmative Action requirements.

5. On March 1, 1978, UMTA Circular 1155.1, "UMTA Interim Equal Employment Opportunity Policy and Requirements for Grant Recipients" became applicable to UMTA grant applicants. The purpose of the Circular was to clarify and strengthen equal employment opportunity procedures for UMTA grant recipients by requiring submission of written Equal Employment Opportunity plans and approval of such plans by UMTA.

6. Section 504 of the Rehabilitation Act of 1973.

   a. The Rehabilitation Act of 1973 commonly referred to as "The Handicapped Civil Rights Law" is to the disabled what the Civil Rights Act of 1964 is to minorities and women.

   b. The Act is an extension of affirmative action and nondiscrimination to disabled persons. Section 504 of the Act provides that handicapped individuals shall not be excluded from participation in, be denied the benefits of or be subjected to discrimination under any program or activity receiving Federal assistance.

   c. The Act requires that an employer make reasonable accommodation to the disabilities of applicants and employees unless it can be demonstrated by the employer that accommodation would impose an undue hardship on the operation of the activity (See pages 61-62 for guidelines defining reasonable accommodation).

7. California Code Sections 19230-19237 (AB 1309), AB 1309 established that:

   Effective January 1, 1978, it is the policy of the State of California to encourage and enable disabled persons to participate fully in the social and economic life of the State and to engage in renumerative employment. Furthermore, it established as State policy that qualified* disabled persons shall be employed in State service in the political subdivisions of the State, in public schools and in all other employment supported in whole or in part by public funds. Disabled persons are to be employed on the same terms and conditions as the nondisabled, unless it is shown that the particular disability is job-related.

8. The Santa Clara County Transportation Agency Equal Employment Opportunity Affirmative Action Plan incorporates the UMTA Interim EEO Policy and Requirements and other Federal, State, and County requirements applicable to the Agency.

PART II — RESPONSIBILITIES

A. *General*

The Agency Equal Employment Opportunity Program is an integral part of the Agency's personnel administration process. Thus, responsibility for the day-to-day administration of the Program and its ef-

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*A disabled person is qualified when such person is capable of performing a particular job with reasonable accommodation relative to such person's disability.

fective implementation resides with all Agency Division Directors, the Agency Personnel Officer and all management, supervisory and other personnel whose actions impact upon the Program. The Agency offices and activities which share primary responsibility for development, implementation and administration of the Program are outlined below.

B. *Agency Director*

The Director, Santa Clara County Transportation Agency, is responsible for development, implementation and administration of an Agency Equal Employment Opportunity Program in keeping with the Equal Employment Opportunity Policy adopted by the Santa Clara County Board of Supervisors on August 7, 1971, and applicable requirements established by UMTA and other Federal and State Agencies and County Affirmative Action Plan.

C. *Affirmative Action Coordinator*

The Transportation Agency Affirmative Action Coordinator will report directly to and serve as Special Assistant to the Transportation Agency Director for the Equal Employment Opportunity Program and other related Equal Opportunity/Affirmative Action matters. The Affirmative Action Coordinator is responsible for:

1. Identifying the actions needed to attain the objectives of the Agency EEO Program.
2. Preparing an Agency EEO Plan that sets forth the actions to be taken to attain the Program's

objectives and assigns responsibility and establishes timetables for their accomplishment.

3. Developing program guidance, monitoring and coordinating the Plan's implementation and related Agency EEO/Affirmative Action activities, identifying problem areas and initiating appropriate corrective actions.

4. Providing assistance and guidance to the Agency's Division Directors as needed to assure accomplishment of the EEO/Affirmative Action tasks and activities applicable to their Divisions.

5. Acting as the Agency Civil Rights Coordinator for contact with State personnel for civil rights matters.

6. Serving as Staff Liaison to the Social Concerns Committee of the Santa Clara County Transportation Commission.

7. Keeping the Director informed of the status of the Agency's EEO Program, including problem areas and actions required for successful attainment of the Program's objectives.

8. Assisting the Director to interpret the Program to interested community agencies and keeping the County Executive, County and Transit District Boards of Supervisors and other appropriate agencies and groups informed of the status of the Program.

D. *Agency Personnel Officer*

The tasks outlined in the Agency EEO Plan are primarily concerned with the personnel steps to be taken in recruitment and selection, training and upgrading, and other actions needed to provide maximum employment and career progression opportunities for women and minorities in job classifications where they are significantly underrepresented. Consequently, primary responsibility for the day-to-day administration of the Program necessarily resides with the Agency Personnel Officer.

Responsibilities of the Agency Personnel Officer include assuring compliance with all the requirements pertaining to the employment of handicapped persons established by Section 504 of the Rehabilitation Act of 1973, California Code Sections 19230-19237 (AB 1309) and other related Federal, State and County directives.

Since the Agency's EEO Plan is primarily concerned with personnel actions, the success of the Plan will be largely dependent on the initiative, imagination and resourcefulness of the Agency Personnel staff in carrying out the varied, complex and extensive tasks that need be accomplished. The ultimate result of the Personnel Office's efforts should be a statistically measurable yearly improvement in hiring, training and promotion of minorities and women throughout the Agency in all major job classifications where they are underrepresented.

E. *Division Directors*

Each Agency Division Director is responsible for all aspects of the Agency EEO Program applicable to

his/her Division. This includes establishment, in cooperation with the Agency Personnel Officer and Affirmative Action Coordinator, of Affirmative Action yearly employment goals for the Division and development and implementation of the procedures required to comply with the Agency's internal and external EEO/Affirmative Action requirements.

Each Division Director is expected to aggressively support the Agency's Affirmative Action Program and to personally assure that all actions pertaining to his/her Division are carried out.

The degree to which each Division attains the Agency Affirmative Action employment goals will provide a measure of that Director's commitment and effectiveness in carrying out the Division's EEO Affirmative Action requirements.

F. *Other Supervisory Personnel*

Supervisory personnel will become thoroughly familiar with the Agency EEO Plan, particularly as it applies to their Divisions, and will assure that their subordinates understand the Plan and give all possible support to attainment of its objectives.

PART III—WORK FORCE UTILIZATION ANALYSIS

A. *General*

1. As of September 30, 1978. the Agency had a total of 1,252 employees (See page 44 for breakout).

2. Three hundred ninety-six or 31.6% of the 1,252 employees were minorities. This significantly ex-

ceeded the 19.7% ratio of minorities in the Santa Clara County area work force (1970 Census).

3. Of the 1,252 employees, 281 or 22.4% were women, significantly falling short of the 36.4% ratio of women in the area work force (1970 Census).

4. While women are greatly underrepresented in the Agency work force and significant deficiencies exist in the distribution of minorities among the Agency's major job classifications, the current work force reflects considerable progress in increasing the representation of women and minorities.

   a. On January 1, 1973, shortly before its reorganization into the County Transportation Agency, the County Department of Public Works had 551 employees. Of these, only 62 or 11.3% were minorities and 47 or 8.5% women.

   b. Between January 1, 1973 and September 30, 1978, the representation of minorities increased from 11.3% to 31.6%. During the same period, the representation of women increased from 8.5% to 22.4%.

   c. The following table presents comparative employment statistics by sex and ethnic group for January 1, 1973 and September 30, 1978:

	Jan. 1, 1973		Sept. 30, 1978		County Goals
	No.	%	No.	%	%
Total Employees	551		1167		
Males	504	91.5	971	77.6	63.6
Females	47	8.5	281	22.4	36.4
White	289	88.8	856	68.4	79.2
Black	2	0.4	102	8.2	1.6
Hispanic	39	7.1	235	18.8	14.8
Asian	16	2.9	28	2.2	2.3
American Indian	4	0.7	13	1.0	0.4
Filipino	*	*	18	1.4	0.6
Total Minorities	62	11.3	396	31.6	19.7

*Included in Asian category at that time.

B. *Minority Representation*

1. As indicated in the preceeding table, as of September 30, 1978, the overall representation in the Agency work force of each minority group approximated or exceeded its ratio in the area work force. (See pages 44 to 57 for breakout by EEOC job category and Agency job classification.)

2. Most of the increases in minority employees since January 1, 1973, occurred in the Skilled Craft, Service and Maintenance and Office and Clerical EEOC job categories. They resulted from the considerable numbers of positions established

within these categories when the Transportation Agency was created. Also, the increases resulted from special affirmative efforts made by the Agency to assure that minorities were aware of employment opportunities available in the transit system and that they received the maximum possible opportunity to compete for employment.

3. Although the overall representation of minorities exceeds their ratio in the area population, considerable imbalances exist in their distribution among the seven EEOC job categories utilized by the Agency. The comparative distribution of each group is as follows. Areas where minority underrepresentation exists are underlined.

EEOC Job Category	White	Black	Hispanic	Asian	American Indian	Filipino	Total Minorities
Officials and Administrators	92.9	0.0	3.6	0.0	3.6	0.0	7.1
Professionals	81.0	1.7	6.9	8.6	0.0	1.7	19.0
Technicians	83.1	4.8	6.5	4.8	0.0	0.8	16.9
Para-Professionals	80.0	0.0	20.0	0.0	0.0	0.0	20.0
Office and Clerical	67.6	7.6	17.2	3.4	1.4	2.8	32.4
Skilled Craft Workers	74.8	4.2	17.2	0.4	2.1	1.3	25.2
Service and Maintenance	61.0	11.4	23.7	1.7	0.8	1.4	39.0
Totals	68.4	8.2	18.8	2.2	1.0	1.4	31.6
County Goals	79.2	1.6	14.8	2.3	0.4	0.6	19.7

C. *Female Representation*

1. Overall Agency.

As of September 30, 1978, 281 or 22.4% of the Agency's 1,252 employees were women.

a. The distribution of female employees by EEOC job category was as follows. Areas where women are underrepresented are underlined.

EEOC Job Category	Total Employees	Number of Women	%
Officials and Administrators	28	2	7.1
Professionals	28	5	8.6
Technicians	124	12	9.7
Para-Professionals	10	9	90.0
Office and Clerical	145	110	75.9
Skilled Craft Workers	238	0	0.0
Service and Maintenance	649	143	22.0
Totals	1252	281	22.4

b. As in the case of minorities, the increase in female representation since January 1, 1973, primarily occurred as a result of the considerable number of new positions established to support and operate the County transit system. Most of the increases occurred in Office and Clerical and Service and Maintenance EEOC job categories. Principal increases resulted in positions established to carry out the Transit Information Services function. In the Service and Maintenance function, the number of women employed as coach operators increased from four when

the Transportation Agency was first established to a total of 115 or 23.6% of a total 488 employed as of September 30, 1978. Also, of the 45 persons employed as Utility Workers, 22 or 48.9% were women.

2. Agency Bus Maintenance Classification

   a. While most of the increases in the representation of women in the Agency occurred in positions pertaining to the transit system, women continue to be greatly underrepresented in the bus maintenance function.

   b. As of September 30, 1978, the Agency Bus Maintenance Division had 215 employees working in a total of 16 maintenance-related job classifications. Women were employed in only five of the 16 job classifications.

   c. Of the 215 employees, only 28 or 13.0% were women. Twenty-two or 78.6% of the 28 women in maintenance were employed as Utility Workers. This is one of the lower level classifications in the bus maintenance field. Three of the other six were Parts Clerks. The others were a Division Maintenance Supervisor, a Vehicle Parts Supervisor and a Vehicle Maintenance Scheduler.

   d. Of the 215 employees, 117 were working in the Service Worker, Second Class Mechanic, and First Class Mechanic job classifications. None of the 117 employees working in these bus maintenance job classifications were women.

3. Other Job Classifications

Women are also greatly underrepresented in Agency job classifications in other than the bus maintenance field. Generally, most of this underrepresentation exists in job classifications where women have not been traditionally employed in significant numbers. Job categories and major Agency job classifications where significant underrepresentation of women exists include the following:

a. Officials and Administrators—Only two of 28 positions (7.1%) are filled by women.

b. Professionals—Five of 58 positions (8.6%) are filled by women. Of the 17 job classifications in the EEOC "Professionals" job category, women are employed in four. The greatest underrepresentation exists in Engineering job classifications; none of the 33 positions in this job category requiring an Engineering background is filled by a woman.

c. Technicians—Twelve of 124 positions (9.7%) are filled by women. The 12 women are employed in 11 job classifications, reflecting significant progress in the entry of women into varied non-traditional job classifications. As in the case of the "Professionals" job category, women are particularly underrepresented in engineering and related positions. Of 30 Engineering Technician and Engineering Aide positions, only one is filled by a woman.

d. Skilled Crafts—None of the Agency's 238 positions in this category is filled by a woman.

e. Road Maintenance Workers—Only one of 110 positions is filled by a woman.

D. *Handicapped Representation*

1. As of September 30, 1978, the Agency work force reflected only one (or 0.1%) handicapped employee.

2. This negligible representation of handicapped persons has resulted from the almost total absence of handicapped persons on the employment lists received by the Agency from the County Central Personnel Department and the negligible numbers of handicapped persons who have applied directly to the Agency for jobs in Transit District job classifications.

3. Information has not been available on the percentage of qualified handicapped persons in the Santa Clara County area work force who could be hired for Agency positions. However, the State Personnel Board has established an estimated percentage of 6.3% in the State population of employable handicapped persons with Visual, Hearing, Speech, Physical and Developmental Disabilities.

E. *Conclusions*

1. As indicated, the overall representation in the Agency of all ethnic minority groups exceeds their ratios in the area work force. However, significant imbalances exist in the distribution of some groups

among particular EEOC job categories. Hispanic persons are particularly underrepresented in the Officials and Administrators, Professionals and Technicians EEOC job categories.

2. Women are the most underrepresented group in the Agency. They are adequately represented in only two of the seven EEOC job categories utilized by the Agency—Office and Clerical and Para-Professionals.

3. Several factors have contributed to the negligible representation of handicapped persons in the Agency work force.

   a. A survey has not been made of existing employees to identify those persons now working for the Agency who meet the definition of handicapped (pages 59-60) because of Visual, Hearing, Speech, Physical or Developmental Disabilities. Also, indications are that some handicapped employees have been reluctant to be identified as having a disability.

   b. Additionally, indications are that an adequate, continuing effort has not been made to assure that handicapped persons in the area are made aware of Agency position openings for which they can compete.

4. Consequently, priority Affirmative Action efforts are needed to:

   a. Increase the representation of minority persons in the Officials and Administrators, Professionals and Technicians EEOC job categories.

b. Increase the overall representation of women in the Agency and their representation in each of the five EEOC job categories where they are presently underrepresented.

c. Develop and implement procedures that assure that handicapped persons in the area work force are regularly made aware of Agency employment opportunities.

PART IV—LONG-RANGE EMPLOYMENT GOALS

A. *Goals*

1. The Agency long-range goal is to attain a work force whose composition in all job levels and major job classifications approximates the distribution of women, minority and handicapped persons in the Santa Clara County work force.

2. The percentage long-range goals established for women and minority groups are based on the ratio of these groups in the area work force as indicated in the 1970 Census. These percentages are as shown below. These goals will be subsequently modified in accordance with data derived from the 1980 Census or other official data that may become available.

Females	36.4%
Hispanic	14.8%
Black	1.6%
Asian or Pacific Islanders	2.3%*
American Indian or Alaskan Native	0.4%*
Filipino	0.6%*

*Population data—work force statistics not available.

The goals established for females and individual ethnic minority groups include attainment of equitable representation of minority women within each group.

3. The 1970 Census did not provide adequate data to permit determination of the percentage of qualified handicapped persons in the labor force. Consequently, the State Personnel Board established an estimated parity figure based on reports from the Department of Rehabilitation, Social Security Surveys, National Health Survey and other sources including the U.S. Census.

   a. Based on an evaluation of these surveys and census reports, the State Personnel Board established a parity figure of 6.3% for consideration by State Agencies when establishing Affirmative Action goals and timetables for hiring persons with Visual, Hearing, Speech, Physical and Developmental Disabilities.

   b. In the absence of more definitive data upon which to establish a goal for hiring handicapped persons, the Agency long-range goal will be to attain a 6.3% representation of such persons in appropriate Agency classifications.

B. *Factors Hindering Goal Attainment*

1. A number of factors make it difficult to attain the Agency's employment goals in Professional, Technical, Skilled Craft and other job classifications where minorities, women and handicapped persons

are currently underrepresented. These include the following:

a. Most of the positions require specialized training and experience. Until recently, relatively few minorities, women and handicapped persons sought entry into these positions. Consequently, the number of persons from these groups in the area labor force who possess the qualifications required for entry into such job classifications is limited.

b. The turnover rate in Agency Professional and Technical positions is very low, greatly limiting the opportunities available to hire minorities, women and handicapped persons in the job classifications where they are most underrepresented.

c. Many of the Agency positions where women are underrepresented involve heavy labor; e.g., Road Maintenance Worker. Consequently, few women seek entry into these positions.

d. As of September 30, 1978, the Agency used 118 different job classifications, 70 of which contained three or fewer positions. The few persons employed in each of these classifications makes it extremely difficult to establish realistic goals for employment of presently underrepresented groups in individual job classifications.

e. The Agency has only a limited number of entry job classifications leading to the Professional,

Technical and Skilled Craft classifications where women are greatly underrepresented. Thus, one of the primary actions required to increase employment opportunities for women is to establish positions and related training programs that will permit women with minimal experience to enter and progress to job classifications where they are underrepresented.

f. Many women are not strongly motivated to seek employment in job classifications where they have not been traditionally employed because of the limited opportunities that have existed in the past for them to work in such classifications.

2. Additional factors that hinder attainment of the employment goal for handicapped persons include:

a. The negligible numbers of applications for employment received from handicapped persons by both the County Central Personnel Department and the Transportation Agency.

b. Requirements in job classifications that unnecessarily exclude handicapped persons from employment (e.g., a requirement for driver's licenses where it is not necessary that every employee working in that classification drive).

c. Misconceptions held by personnel staffs and other persons involved in the employment process about the ability of handicapped persons to perform effectively in a variety of jobs.

C. *Goal Attainment Process*

1. As indicated by the above factors, it will be much easier to attain the Agency's employment goals in some job categories than in others. It is particularly evident that it will be extremely difficult to significantly increase the representation of women in technical and skilled craft job classifications where they have traditionally been greatly underrepresented. Similarly, only gradual increases in the representation of women, minorities or handicapped persons in management and professional positions can realistically be expected due to the low turnover that exists in these positions and the small numbers of persons who can be expected to compete for available openings.

2. This situation mandates that the Agency's Affirmative Action employment goals be attained in successive stages as indicated below.

   a. In the Agency taken as a whole.

   b. By major job category as established by the U.S. Equal Employment Opportunity Commission:

      (1) Officials and Administrators
      (2) Professionals
      (3) Technicians
      (4) Protective Service Workers
      (5) Para-Professionals
      (6) Office and Clerical
      (7) Skilled Craft Workers
      (8) Service and Maintenance

c. By major job classifications utilized by the Agency (e.g., Engineering, Coach Operator, Mechanic, etc.).

D. *Projected Work Force Expansion*

1. In July 1978, the Board of Supervisors approved an additional 734 positions for the Agency to support the planned expansion of the County bus fleet from 236 to 516 buses. As the County Transit System continues to expand, additional positions will need to be authorized.

2. The majority of the newly authorized positions are for coach operators and for maintenance personnel. The new positions will offer an opportunity for increased numbers of women to obtain employment as coach operators and in the bus maintenance field in positions where they have not traditionally been significantly utilized and are now greatly underrepresented. Thus, a key purpose of the Agency EEO Affirmative Action Plan will be to assure that women get the maximum possible opportunity for placement and career progression in such positions.

3. Since most of the new positions being authorized to support the expanded bus fleet are for coach operators and maintenance support personnel, the Agency work force expansion will result in only a limited increase in the opportunity to increase the representation of minorities, women and handicapped persons in management and professional positions. Increased opportunities for placement of persons from underrepresented

groups in such positions will mainly be limited to position vacancies occurring from personnel turnover.

4. Thus, even though the Agency is in process of expansion, it will be a slow and extremely difficult task to attain the Agency's Affirmative Action employment goals. Although additional positions are being established in the maintenance area, the limited availability of women with experience in this field will make it difficult to attain significant numbers of female applicants. Similarly, the low turnover in Agency management and professional positions will greatly limit the opportunity for minorities, women and handicapped persons to compete for such positions. Consequently, attainment of the Agency's employment goals in all EEOC job categories and major Agency job classifications will necessitate that the Agency Personnel Office and Division Directors give special consideration to Affirmative Action requirements in every individual hiring action pertaining to positions where minorities, women and handicapped persons continue to be underrepresented. This must be done so that no opportunity will be lost to assure that persons from these groups are provided the maximum possible opportunity for employment or career progression whenever such positions are filled either from outside the Agency or by promotion from within.

PART V — SHORT-RANGE EMPLOYMENT GOALS

A. *General*

Yearly goals for employment and advancement of minorities, women and handicapped persons in job classifications where they are underrepresented need be established to:

1. Provide a guide to the Agency Personnel Office and Division Directors indicating specific job classifications where underrepresentation of women, minorities and handicapped persons exists and where Affirmative Action is required.

2. Provide an objective standard for use in determining if the representation of minorities, women and handicapped persons in particular job classifications is at a reasonable level in comparison with estimates of the numbers of persons from these groups in the area work force who can meet the educational and experience requirements for employment.

3. Permit adjustment of Agency hiring goals as may be necessary because of limitations on hiring or reductions in the County work force resulting from financial restrictions imposed by Proposition 13 or other factors that may impact adversely upon the County's financial situation.

	Action	Action Office*	Timetable
B.	*Tasks*		
1.	Assure that all Agency job classifications are categorized into the appropriate job categories established by the Equal Employment Opportunity Commission (EEOC). Ascertain that Agency job classifications are similarly categorized in the County Personnel Department's Affirmative Action Personnel Data Reports to assure that the County and Agency report the data in the same manner.	APO	Accomplished 4/25/78 Continuous
2.	Determine the sex and ethnic category of all Agency employees. Identify each employee as belonging to one of the following ethnic groups: White, Black, Hispanic, Asian, American Indian and Filipino. (See page 58 for definition of ethnic categories).	APO	Accomplished Continuous
3.	Identify Agency employees who are handicapped as defined by the State of California Personnel Board Affirmative Action Guidelines for the Disabled (see pages 59-60).	APO	3/15/79 Continuous
4.	Establish computer programs that produce the following quarterly computerized reports as of March 31, June 30, September 30, and December 31. Provide a copy of these reports to the Affirmative Action Coordinator.		
a.	Agency work force composition and distribution by EEOC job category, salary level, sex, handicapped status and ethnic group. (This report should contain the data needed to comply with the EEOC Annual EEO-4 Report.)	APO/TD	Accomplished Continuous

*For abbreviations, see page 58.

b. Agency work force composition and distribution by EEOC job category, Agency job classification, sex, handicapped status and ethnic group.	APO/TD	Accomplished 6/30/78 Continuous
c. New hires and releases by EEOC job category, Agency job classification, sex, handicapped status and ethnic group.	APO/TD	4/1/79 Continuous
d. Data on the numbers and percentages of minority women employed by the Agency and their distribution by EEOC job category and Agency job classification.	APO/TD	4/1/79 Continuous
5. Produce the computerized reports on the Agency work force composition and distribution (as indicated in paragraph 4a-d) by Agency Division as may be required by the Affirmative Action Section.	APO/TD	6/1/79 Continuous
6. Determine the additional numbers of employees by sex and ethnic group required for the Agency to attain an equitable representation for each group in all EEOC job categories. Also determine the numbers of women and minorities required to attain parity in each major job classification utilized by the Agency. (Major job classifications are those that include six or more positions.)	AAC	4/15/79 Continuous
7. Ascertain the number of minority women within each minority group required to provide them equitable representation in each EEOC job category and major Agency job classifications.	AAC	4/15/79 Continuous
8. Investigate the possibility with the County Affirmative Action Section of obtaining work force statistics from the Coun-	AAC	5/1/79

ty Planning Department and other sources reflecting the ratio of minorities, women and handicapped persons who are working in the local area in major job classifications relating to those utilized by the County Administration.

9. Utilize the above data, if available, to determine the percentages of women, minorities and handicapped persons that should realistically be employed in each of the major job classifications utilized by the Agency. AAC/APO 6/15/79

10. Establish, in cooperation with Division Directors, realistic yearly employment goals for women, minorities and handicapped persons in each EEOC job category and major job classification. Base these goals on the best available predictions of position vacancies and the availability of women, minorities and handicapped persons in the area work force who can meet the entry qualifications for the positions. Include specific goals for minority women. AAC/APO 6/30/79 Continuous

NOTE: The "goals" established for each Division should not be construed as "quotas" that must be met. The "goals" should rather be seen as realistic desired levels of achievement correcting imbalances in a Division's work force. Goals should take into account such factors as turnover, layoffs, lateral transfers, new job openings, retirements and availability of minorities, women and handicapped persons in the area work force who possess the desired qualifications or potential for placement. Recognition should be given the fact that it will take longer to correct imbalances in job classifica-

tions requiring specialized education and professional skills than it will in other occupations.

11.	Reach all significant handicapped groups in the Santa Clara County area and make them aware of Agency employment opportunities available to handicapped persons.	APO	6/1/79 Continuous
12.	Determine the relative numbers of job applications received from handicapped persons as a result of the Agency's affirmative efforts. Based on this and data obtained on the relative availability of employable handicapped persons in the area, establish realistic yearly Agency employment goals for handicapped persons.	AAC/ APO	7/15/79 Continuous

PART VI—RECRUITMENT

A. *General*

1. The underrepresentation of minorities, women and handicapped persons has resulted from entrenched patterns in hiring and promotion. Thus, the mere existence of an opportunity for members of these groups to apply for jobs in Agency job classifications where they are underrepresented will not by itself result in timely attainment of parity for currently underrepresented groups.

2. Affirmative actions to remove long standing barriers to hiring and promotion of women, minorities and handicapped persons must be forceful and far-reaching measures. These measures must necessarily encompass all personnel policies and practices. An initial, imperative requirement to make equal opportunity a reality for all groups is to take the aggressive, positive, continuing actions necessary to make persons in all underrepresented groups aware of Agency job opportunities for which they can compete.

3. Recruitment procedures for each major job category where underrepresentation of women and minorities exists must be continually reviewed and analyzed. This must include as-

suring that potential sources of minority and female applicants are not overlooked (e.g., mechanic training courses at junior colleges and those conducted by local manpower training programs, etc.).

4. Indications are that there is an increasing percentage of women in the area who desire to work in non-traditional positions. This makes it desirable to modify the existing recruitment process as needed to reach such women and provide them an opportunity to compete for available positions.

5. The minimal number of job applications received in the past from handicapped persons suggests a definite need to establish procedures assuring that Agency job opportunities are made known to handicapped persons.

	Action	Action Office	Timetable
B.	*Tasks*		
1.	Obtain authorization for an additional Personnel Analyst position in the Agency Personnel Office. Assign this individual primary responsibility for assuring that all tasks assigned the Personnel Office by the Agency EEO Affirmative Action Plan are carried out in accordance with the established timetables. Utilize this analyst to conduct specialized recruitment of minorities, women and handicapped persons as necessary to attain an equitable representation of these groups in all job areas where they are underrepresented.	APO	4/15/79 Continuous
2.	Give priority attention and emphasis to recruitment of minorities, women and handicapped persons for job classifications where these groups are underrepresented. Where the County Personnel Department is responsible for recruit-	APO	Continuous

	ment, work with that Department and assure that priority recruitment efforts are made for positions where significant underutilization of minorities or women exists. (Consider "significant underutilization" as existing when the representation of such a group in a major job classification is less than 70% of that group's representation in the area work force.)		
3.	Develop and maintain a mailing list of minority, women's and handicapped organizations in the area who are especially concerned with assisting persons from these groups to find meaningful employment. Also include in the list mechanic training programs at local community colleges, private technical training schools, Manpower Programs funded by the Santa Clara Valley Employment and Training Board and other organizations where women can possibly be recruited for positions in the maintenance field where they have not been traditionally employed. Distribute job announcements to those groups on a selective basis as needed to encourage women, minorities and handicapped persons to compete for Agency positions.	APO	3/15/79 Continuous
4.	Establish continuing recruitment relationships with schools and other educational institutions having significant numbers of disabled students, including contacts with coordinators for disabled students in colleges and training facilities for the handicapped, such as schools for the blind, deaf or retarded. Also establish and maintain contact with community groups representing the handicapped and agencies such as the State Department of Rehabilitation, State Em-	APO	4/15/79 Continuous

ployment Development Department, Veterans Administration and local rehabilitation facilities.

5.	Establish a program to recruit handicapped persons for all appropriate entry and higher level job classifications. Within this program, give consideration to the following:	APO	6/1/79 Continuous
	a. Utilizing, when feasible, special Federal employment programs such as Career Opportunities Development Program (COD), Career Employment Training Act (CETA) and State programs such as Career Opportunities for the Mentally Retarded.		
	b. Maintaining liaison with the California State Personnel Board to obtain lists of disabled persons available for employment.		
	c. Monitoring Agency recruitment efforts to ensure that disabled groups are reached.		
	d. Revising the format of Agency job announcements to include phrases such as "Disabled workers hired" or "We employ disabled Workers" and prominently displaying the "handicapped symbol of access".		
6.	Implement a Job/Application Period Notification Card System to permit individuals to register their interest in particular positions in the Agency. Accept the cards on a continuing basis for all Agency positions. Particularly encourage the submission of such cards by minorities, women and	APO	Accomplished Continuous

handicapped persons for Agency job classifications where these groups are underrepresented.

a.	Utilize the Job Interest/Application Period Notification Cards during the routine recruitment process for selective recruitment of minorities and women. Contact and encourage persons from underrepresented groups to submit cards. Through this effort, maintain a job bank of persons from these groups who are interested in Agency employment.	APO	Continuous
b.	Visit mechanic and other training programs conducted by local community colleges, other technical programs, and Manpower Programs funded through the Santa Clara Valley Employment and Training Board. Through these visits, provide Job Interest/Application Period Notification Cards to trainees in programs that directly relate to Agency personnel requirements and attainment of the EEO Plan's employment goals.	APO	4/15/79 Continuous
c.	Make a special effort to inform females who are enrolled in such training programs throughout the County of employment opportunities in the maintenance field available to them in the Agency. Either provide such persons notification cards or specifically notify them of application periods for Utility Workers, Service Workers or other appropriate related positions.	APO	4/15/79 Continuous
7.	Make available Agency job specifications and Agency job application forms to local community agencies concerned	APO	Continuous

	Action	Action Office	Timetable
	with assisting minorities, women and handicapped persons to obtain employment.		
8.	Involve appropriate Division Directors in recruitment efforts to fill engineering and other positions that require special efforts to find persons from underrepresented groups with the requisite education, training or experience. Additionally, utilize to the extent possible the Agency's own technicians, engineers, etc., particularly minorities and women, to recruit minority and female applicants.	APO	Continuous
9.	Provide all possible assistance to the Central Personnel Department in recruiting persons to fill job classifications within the Agency where minorities and/or women are significantly underutilized.	APO	Continuous
10.	Inform the Agency Affirmative Action Coordinator and Agency Director of instances where inadequate numbers of applications are received from minorities and women for positions where these groups are underrepresented. If possible, extend the application period and conduct specialized recruitment for such positions until an adequate number of applications is received from such persons.	APO	Continuous
11.	Develop and implement procedures to recruit and select minorities, women and members of non-minority groups to be admitted into the Agency Fellowship Training Program.	SA/ AAC/ APO	Accomplished 1/3/78 Continuous

PART VII — SELECTION AND APPOINTMENT

A. *General*

1. Experience has shown that the selection and appointment processes are areas where hidden discrimination frequently occurs. Thus, a key requirement of the Agency EEO/Affirmative Action Plan is to continually review these processes and to take the positive actions needed to assure that minorities, women and handicapped persons are not inadvertently denied opportunity for employment because of deficiencies in these processes.

2. The County Central Personnel Department is responsible for development of employment eligible lists for many of the job classifications utilized by the Agency. In these instances, the Agency's ability to hire minorities, women and handicapped persons in jobs where they are underrepresented is dependent on the availability of persons from these groups on the employment lists provided the Agency by the County Personnel Department. Thus, an important requirement of the Agency EEO Plan is for the Agency Personnel Office to work cooperatively with the County Personnel Department to assure that such lists contain adequate numbers of persons from underrepresented groups who can be considered for Agency positions.

	Action Office	Timetable
B. *Tasks*		
1. Determine the screening, testing and selection results attained from each employment list established by the Agency. Specifically, determine for each list the numbers and percentages of minorities, women and handicapped persons who:	APO	Continuous
a. Applied for a particular position		
b. Were considered as meeting the minimum qualifications for the position		

Action	Action Office	Timetable
c. Took and passed each written and performance test given for the position		
d. Appeared before an oral board and received a qualifying score		
e. Were placed on the employment list for the position		
f. Were ultimately hired.		
2. Analyze the results attained on all examinations administered by the Agency, including findings of oral boards. Determine if any phases of the examination process result in "adverse impact" upon minorities and women. In instances where "adverse impact" is found, initiate appropriate action to improve the examination phases or to validate the examination process involved. Provide the results of these analyses to the Agency Affirmative Action Coordinator.	APO	Continuous
3. Develop and maintain a list of minorities, women and handicapped persons who are qualified and available to serve on screening and oral boards for positions utilized in the Agency.	APO	Continuous
4. Include qualified minorities and women, if possible, on all screening and oral boards conducted by the Agency. To the extent possible, utilize minorities and women who have competency in the job area being tested.	APO	Continuous

5.	Provide for participation, where possible, by members of disabled groups on Agency oral boards concerned with making qualification appraisals of applicants who include handicapped persons.	APO	Continuous
6.	Develop guidelines and advise oral boards about questions they can and cannot ask during interviews.	APO	Accomplished Continuous
7.	Initiate action to establish Spanish or other language eligible lists when it is determined that special language capabilities are necessary for effective accomplishment of Agency functions and that existing lists do not contain persons with the required language skills.	APO	Continuous
8.	Accomplish a review at least every six months of decentralized eligible lists maintained by the Agency and determine if they contain adequate numbers of minorities and women. Where the finding is negative and it can be reasonably expected to recruit minorities and/or women in the positions to which the lists apply, declare those lists deficient and reopen recruitment and testing as necessary to attain adequate representation on such lists of the underutilized groups.	APO	Continuous
9.	Keep the County Personnel Director, County Affirmative Action Officer and Women's Coordinator informed of job classifications utilized by the Agency, for which employment eligible lists are developed by Central Personnel, where minorities, women and handicapped persons are underrepresented. Request that appropriate recruitment actions, with assistance of the Agency, as desired, be taken to assure that members of underrepresented groups are placed on the eligi-	AAC/ APO	Continuous

	ble lists developed by the Central Personnel Office for Agency positions where such groups are underrepresented.		
10.	Assess the adequacy of each employment eligible list provided the Agency by the County Personnel Department. Compile the following data for job classifications where minorities, women or handicapped persons are underrepresented. a. The total numbers and percentages of minorities, women and handicapped persons contained on successive lists provided for individual job classifications. b. The numbers and percentages of minorities, women and handicapped persons from those available on the employment lists selected for employment.	APO	Continuous
11.	Inform the County Personnel Director in writing of eligible lists provided the Agency by Central Personnel found to be inadequate so that he/she can assure that appropriate action is taken by the Personnel Department to reopen the lists and recruit members of underrepresented groups as needed to develop adequate lists.	APO	Continuous
12.	Assure that Division Directors and other persons involved in the hiring process are aware that the County Merit System Rules provide for use of Selective Certification to fill positions where particular abilities, knowledge or traits are required, including necessary language skills.	APO	Continuous

13. Establish a procedure requiring that prior to certifying names for employment selection to Division Directors, the Agency Personnel Office:	APO	6/15/79 Continuous
a. Ascertain the degree of underrepresentation of minorities, women and handicapped persons that exists within the requesting Division in the job classifications to be filled and advise the Division Director accordingly.		
b. Determine the numbers of persons from underrepresented groups who will be certified and informally assure that the Division requesting the certification is aware that it will have the opportunity to consider such persons.		
c. Determine, in positions where Hispanic or other minority persons are underrepresented, whether the positions requtre public contact and would be beneficially filled by a person fluent in Spanish or another language. In instances where such persons are on the eligible list, assure that the requesting Division Director is aware that persons with the desired language capability are on the list and that Selective Certification can be utilized.		
14. Establish a procedure requiring that Division Directors review the ethnic and sexual composition of their work force when they request a list of eligible persons to fill a vacancy. Include in the process a requirement that Division Directors indicate why they did not select minorities, women and handicapped persons if such persons were on the list of eligibles considered and if the Division had an underrepresentation of such persons in the job classification being filled.	AAC/ APO	6/15/79

	Action	Action Office	Timetable
15.	Investigate the possibility of establishing a procedure whereby the top seven persons from an eligible list are referred for consideration for each Transit District position opening and additional persons are referred as needed to permit the hiring supervisor to consider three women and/or ethnic minorities and handicapped persons for positions where these groups are underutilized.	AAC/ APO	7/1/79 Continuous
16.	Advise the Agency Personnel Officer when the employment lists provided the Division do not contain adequate numbers of individuals from groups that are underrepresented in the Division. Also inform the Agency Personnel Officer when Selective Certification is desired to give hiring consideration to persons with desired language capabilities.	ADD	Continuous
17.	Inform job applicants of the reasons for their not being placed on an Agency employment list. Do this to minimize unjustified antagonisms toward the Agency and initiation of discrimination and other complaints because of possible misconceptions of evaluations made by oral boards. As applicable, include in the letters to applicants the facts that:	APO	Accomplished Continuous
	a. Competition for the position was intense with a total of "X" numbers applying and "Y" numbers placed on the Agency eligible employment list.		
	b. Applicant was considered fully qualified for the position, but was merely not placed on the employment list		

because of the lower evaluation score attained relative to scores attained by others of the many applicants.

c. The eligible list will be in effect for "X" period. Subsequently, the list will be reopened and the applicant can again compete for the position at that time.

PART VIII—UPGRADING AND TRAINING

A. *General*

1. Women and minorities are generally underrepresented in administrative, technical, managerial and professional positions in the Agency. At the same time, many are over-educated for the lower level jobs they hold. Thus, one of the key requirements of the EEO Affirmative Action Program is to identify the management efforts to be systematically made that focus on personnel policy and techniques, including classification, counselling, selection, training and development to assure that minorities, women and handicapped persons who are working below their potential are provided the training and other opportunities needed to advance to higher job levels where maximum utilization can be made of their capabilities.

2. One of the main reasons that women are underrepresented in the bus maintenance and other technician and skilled craft job classifications utilized by the Agency is that past practice has been to establish positions at above a trainee level, requiring previous experience for initial placement. Since women have not been traditionally employed in significant numbers in such job classifications, few women in the area work force have been able to meet the entry requirements for most of the bus maintenance classifications utilized by the Agency. This is particularly evident in the fact that of 214 employees working in bus maintenance jobs in the Agency on June 30, 1978, only 27 or 12.6% were women. Twenty-one of these were working as Utility Workers, a position that does not require previous experience in maintenance

3. Thus, in order to truly provide women an adequate opportunity to attain employment in maintenance and other job classifications where they have not been traditionally utilized, the Agency EEO Affirmative Action Program must provide for establishment of entry level positions that will permit entrance into these job fields for women who have not had previous experience in the maintenance area. If this is not done, the situation will continue to exist where women are not hired into positions where they are now underrepresented because they do not have the required entry experience. And, most will never get the experience because they cannot gain entry into such positions. This cycle must be broken if the Agency is to ever attain a meaningful representation of women in the varied bus maintenance job classifications.

4. A number of varied, complementary actions are needed to permit women from outside and from within the Agency to obtain employment in the diverse bus maintenance specialties utilized within the Agency bus maintenance system and in other non-traditional job specialties.

5. Attainment of an appreciable increase in the representation of women in the Agency's bus maintenance work force and establishment of a realistic, continued opportunity for women to attain employment and career progression in the bus maintenance field within the Agency will not be easy. It will require that top priority be given to implementation of the actions subsequently outlined. Also, it will require that both the Agency Personnel Office and the Bus Maintenance Division exercise the maximum degree of imagination, initiative, resourcefulness, perseverence and innovation in carrying out the tasks required to modify the existing personnel process and establish the varied training programs needed to provide women an adequate opportunity to gain employment in all phases of bus maintenance. The same situation holds true in other operational areas in the Agency where women are greatly underrepresented in non-traditional job classifications.

	Action	Action Office	Timetable
B.	*Tasks*		
1.	Review all Agency job classifications utilizing six or more positions where minorities and women are underrepresented. Identify positions where promotional and training opportunities can be improved for underrepresented groups through job restructuring by reducing the gap and increasing the number of steps between present low-skilled and higher skilled jobs.	APO	8/15/79 Continuous
2.	Obtain approval of the Board of Supervisors to establish an Agency Fellowship Program that will enhance the ability of the Transportation Agency to attract qualified professional personnel by offering students of diverse discipline interests, race and sex an on-going program of recruitment, education and full-time summer and part-time academic year employment with the Agency.	DIR	Accomplished 5/24/78
3.	Establish an Agency position classification of Transportation Agency Fellow at the I, II, III and IV level for assignment, utilization and training of participants in the Agency Fellowship Program.	APO	1/15/79
4.	Identify, in cooperation with the Central Personnel Department, as appropriate, training positions which can be established to facilitate entry of minorities, women and handicapped persons into job classifications where they are significantly underutilized.	APO	9/15/79 Continuous

	Action	Action Office	Timetable
5.	Establish, if possible, a Helper, or other comparable entry level position, in every maintenance job classification series which includes six or more positions and in which minorities or women and, where approriate, handicapped persons, are underrepresented. Establish as entry qualifications for these positions the minimum training and/or experience required for effective performance.	APO	4/15/79 Continuous
6.	Identify the areas where establishment or modification of career ladders within the job classifications utilized by the Agency can enhance employment opportunities for under-represented groups and initiate action necessary to bring about desired changes.	APO	Continuous
7.	Develop and implement an Agency on-the-job and classroom training program that will provide persons in the Utility Worker job classification the opportunity to meet the mandatory requirements for entry into the Service Worker job classification or to progress to other Transit District jobs, e.g., Body Shop, Upholstery Shop, Paint Shop, Engine Rebuild, etc.	APO/ FO	3/15/79 Continuous
8.	Develop and implement a training program that will permit Service Workers to acquire the skills and experience needed to progress to Second Class Mechanics.	APO/ FO	4/15/79 Continuous
9.	Establish cooperative working relationships with the San Jose City College School of Apprenticeship and other community colleges and technical training agencies in the area	APO/ FO	4/15/79 Continuous

	and obtain their assistance in developing curriculums for classroom and other training as needed to aid advancement of Agency employees from entry to higher level job classifications in maintenance and related fields.		
10.	Identify the actions needed to establish a formal, State-approved Bus Mechanic Apprenticeship Training Program for the Agency. The major purpose of this program should be to facilitate entry of women and other underrepresented groups into the bus maintenance field and increase their opportunity to progress to the journeyman level.	AAC	Accomplished 6/8/77
11.	Investigate the feasibility of initially establishing an Agency Bus Mechanic Apprenticeship Training Program and subsequently expanding the Program to include other appropriate maintenance specialities required to maintain the County bus fleet.	APO/ FO/ AAC	4/15/79
12.	Develop and implement the Bus Mechanic Apprenticeship Training Program or other equally comprehensive training programs that will facilitate entry and career progression in the bus maintenance field for women and other underrepresented groups in the bus maintenance specialties.	APO/ FO	8/15/79 Continuous
13.	Administer "Extra Help" hiring programs in a manner that provides minorities, women and handicapped persons an equitable opportunity to attain employment and work experience in the Agency in keeping with the goals of the Agency EEO Plan.	APO/ ADD	Continuous

	Action	Action Office	Timetable
14.	Make Agency employees aware of Spanish and other foreign language training available to improve their ability to serve and work with the non-English-speaking persons served by the Agency.	APO	Continuous
15.	Identify minorities and women qualified for upward mobility. Review records of all employees, analyzing and comparing qualifications such as education, experience, seniority, performance records and other factors that may indicate workers who are in jobs below their capabilities.	APO/ ADD	Cotinuous
16.	Establish an Agency career counselling program that facilitates and encourages Agency employees, particularly women, minorities and handicapped persons, to qualify and compete for higher level Agency positions. Include in the system an on-going process that will keep Agency employees informed of projected job opportunities that will result from personnel turnover, establishment of new jobs, etc., and the educational and experience requirements applicable to the positions.	APO/ ADD	7/15/79 Continuous
17.	Establish a procedure that ensures that handicapped persons are counselled and properly trained during and after their probationary periods if appropriate.	APO	8/15/79
18.	Establish a tuition assistance program to aid minorities, women, handicapped and other persons who desire to attend outside educational or training programs which will con-	APO/ ADD	4/15/79 Continuous

	tribute to their job capabilities and advancement opportunities.		
19.	Determine the feasibility of establishing a requirement that a senior maintenance supervisor be assigned to monitor the day-to-day performance of women and other employees, as appropriate, who have been promoted and are serving their probationary periods. Make the supervisor responsible for assuring that the upgraded employees receive the maximum possible opportunity to demonstrate their competence in the positions to which they have been advanced.	APO/ AAC	5/1/79 Continuous
20.	Investigate the desirability of establishing a Women's Committee that includes Agency female employees in professional and management positions who are interested in bringing about improved employment and career progression opportunities for women within the Agency. Purposes of the Committee would include working with the Agency Personnel Office and the County Women's Coordinator in developing and implementing actions necessary to bring about increased representation of women in Agency job classifications where they are underrepresented.	AAC	3/15/79
21.	Maintain statistics on the numbers of persons by sex and ethnic group who: a) enter training as coach operators, b) are eliminated from the training program and c) complete the program satisfactorily.	TO	Continuous
22.	Determine if the sucess rate in completing the coach operator training program by women and minorities is comparable to the success rate attained by other groups. If significant dis-	TO/ AAC	Continuous

Action	Action Office	Timetable
parities exist in elimination rates for minorities and women, determine the causes and actions required for resolution.		
23. Provide Division 265, Amalgamated Transit Union (ATU-265) the maximum possible opportunity to participate cooperatively in the development of training programs or other actions considered by the Agency to bring about improved employment and career progression opportunities for women and other underrepresented groups. The purpose of such cooperative effort should be to give consideration at an early stage to ATU-265 views regarding actions that can be taken to provide such opportunities and thus gain acceptance and support of the programs by ATU-265.	APO/ ADD	Continuous
24. Provide a similar opportunity to Local 715, SEIU, AFL-CIO and other employee organizations concerned with improvement of employment and career progression opportunities for Agency employees, including women and other underrepresented groups.	APO/ ADD	Continuous

PART IX—PROGRAM MONITORING, EVALUATION AND REPORTING

A. *General*

The EEO Plan is an integral part of the Agency personnel management system. The Plan requires that a continuing objective evaluation be made of all phases of the personnel process to assure that minorities, women and handicapped persons are provided an adequate opporunity to gain equitable representation in all job classifications utilized by the Agency and an equitable opportunity to develop their capabilities and progress within the Agency.

B. *Tasks*

1.	Analyze and evaluate recruitment, selection, testing and promotional practices. Identify and initiate actions as appropriate, to eliminate artificial and discriminatory barriers that impact adversely on employment and career progression opportunities for minorities, women and handicapped persons.	APO/ AAC	Continuous
2.	Provide to the Affirmative Action Coordinator as of March 31, and September 30 of each year the following summary statsistics for each employment list established by the Agency. The numbers and percentages of minorities, women and handicapped persons who (Task VII, B1, page 26):	APO	3/31/79 Continuous
	a. Applied for a particular position		
	b. Were considered as meeting the minimum qualifications for the position		
	c. Took and passed each written and performance test given for the position		
	d. Appeared before an oral board and received a qualifying score		
	e. Were placed on the employment list for the position		
	f. Were ultimately hired.		
3.	Analyze the data obtained per item B-2 above and determine the degree of progress being made toward attainment of the Agency's Affirmative Action employment goals. Inform the Director and Agency Personnel Officer of areas where pro-	AAC	4/15/79 Continuous

	Action	Action Office	Timetable
	gress is inadequate and corrective action and increased management emphasis is required.		
4.	Review of March 31 and September 30 of each year data obtained on new hires and releases by EEOC job category, Agency job classification, sex, handicapped status and ethnic group (See Task V, B, 4c, page 20). Identify disparities that reflect adverse impact on the Agency's EEO employment goals. Inform the Director and Agency Personnel Officer of findings and of corrective action deemed appropriate.	AAC	4/15/79 Continuous
5.	Provide the Affirmative Action Coordinator, for analyses purposes, summary statistics as of June 30 and December 31 of each year by sex and ethnic group on the number of persons who: a) entered training as coach operators, b) were eliminated from the training program and c) completed the program satisfactorily.	TO	Continuous
6.	Analyze the work force composition and distribution by Agency Division. Determine where underrepresentation of minorities and women exists and the causes of underrepresentation. Initiate corrective action, as appropriate.	APO/ AAC	Continuous
7.	Keep Division Directors aware of deficiencies in the representation of minorities and women in their Divisions and of opportunities available to them to consider persons from these groups for existing or projected vacancies.	APO/ AAC	Continuous
8.	Develop procedures for submission, investigation and resolution of complaints involving discrimination in employment within the Transportation Agency.	AAC	Accomplished Continuous

9.	Conduct investigations of discrimination complaints. Give emphasis during the investigations to identifying the underlying causes of complaints to preclude recurrence and to correct any existing deficiencies in the personnel administration process.	AAC	Continuous
10.	Keep the Agency Affirmative Action Coordinator informed of all significant current or planned actions that impact upon the Agency's EEO Program, including the following:	APO	Continuous
	a. Existing and projected job vacancies and numbers of personnel to be hired.		
	b. Actions taken or planned to assure maximum consideration for employment of women, minorities and handicapped persons for positions where these groups are underrepresented.		
	c. Information on current recruitment, testing and selection processes which will enable the Affirmative Action Coordinator to respond to queries from minorities, women and handicapped persons and other groups regarding these areas.		
	d. Sex, ethnic categories and handicapped status, if appropriate, of new hires and positions in which placed.		
11.	Develop and maintain current statistical data on the composition and distribution of the Agency work force; the Agency's Affirmative Action employment goals by Division,	APO/ AAC	Continuous

	Action	Action Office	Timetable
	sex, ethnic group, handicapped status and job classification; and other summary information required by the Director to keep him informed of the overall status of the Agency's EEO/Affirmative Action Program.		
12.	Monitor accomplishment of all actions outlined in the Agency Affirmative Action Plan. Where slippages occur in accomplishment of actions from established timetables, determine causes and required action.	AAC	Continuous
13.	Keep the Agency Director informed of the status of the Agency EEO Program in relation to Plan, problems experienced and actions required for resolution.	AAC	Continuous
14.	Provide the Director a bi-monthly report informing him of significant EEO/Affirmative Action activities occurring during the period. Provide information copies of the report to the Agency Division Directors, County Executive, County Board of Supervisors, County Affirmative Action Officer and County Women's Coordinator to keep them aware of significant activities and status of the Agency EEO Program.	AAC	Continuous
15.	Provide the County Affirmative Action Advisory Council and the Social Concerns Committee of the County Transportation Commission data, as may be required, pertaining to the Agency EEO Affirmative Action Program.	AAC	Continuous
16.	Compile and submit the Annual EEO-4 report required by the Equal Employment Opportunity Commission.	APO/ AAC	Continuous

17.	Provide the Affirmative Action Coordinator on a continuing basis copies of employment analyses and other data developed by the Agency Personnel Office which may be helpful in assessing progress toward attainment of the Agency's Affirmative Action employment goals and to prepare required status reports on the Agency EEO Program.	APO	Continuous
18.	Prepare as of December 31 of each year a summary report of the Agency's EEO/Affirmative Action Program for submission to the County Executive, County Board of Supervisors, County Transportation Commission, County Affirmative Action Advisory Council and other appropriate individuals or agencies. Include the following in the report:	AAC	Continuous
	a. Significant actions taken since the last report.		
	b. Current composition and distribution of the Agency work force by handicapped persons, sex, ethnic category and major job classifications.		
	c. Progress made during the preceding year toward attainment of the program's goals.		
	d. Actions taken, underway or projected, to attain the program's objectives.		
	e. Special problem areas and actions required for their resolution.		

PART X—EXTERNAL EMPLOYMENT

A. *General*

1. The Transportation Agency is required to assure that contractors, both construction and

non-construction, involved in Federally and State-assisted projects comply with the Equal Employment Opportunity requirement established by Federal and State directives applicable to such projects.

2. Executive Order 11246, as amended, requires that all Government contracting agencies include in every government contract the requirement that the contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex or national origin. Also, it requires that contractors take affirmative action to ensure that applicants are employed, and that employees are treated during employment without regard to their race, color, religion, sex or national origin. Additionally, the Order requires that each contractor having a contract containing these provisions must file and require subcontractors to file compliance reports with the contracting agency or Secretary of Labor as may be directed. Compliance with the New Model Federal EEO Bid Conditions placed in effect by the Secretary of Labor on September 1, 1976, satisfies the requirements of Executive Order 11246, as amended.

3. Revised Order No. 4, Affirmative Action Guidelines, issued by the Office of Federal Contract Compliance Programs imposes similar requirements on Federal non-construction contractors and subcontractors. Other Federal and State guidelines and directives expand on the requirements imposed by Executive Order 11246 and related directives.

4. Section 503 of the 1973 Rehabilitation Act, issued by the U.S. Department of Labor, April 9, 1976, requires all contractors with a Federal government contract in excess of $2,500 to take affirmative action in hiring qualified handicapped individuals, and to treat these individuals without discrimination based upon their physical or mental handicap in all employment practices.

5. The Transportation Agency is required by these and other related Federal and State directives to assure that contractors involved in Agency projects comply with applicable EEO requirements established by such directives. Tasks to be accomplished to ensure compliance with such requirements are subsequently outlined.

	Action	Action Office	Timetable
B.	*Tasks*		
1.	Obtain approval of the Santa Clara County Board of Supervisors to make the New Model Federal EEO Bid Conditions, implemented by the Secretary of Labor on September 1, 1976, applicable to all construction contracts awarded by the County. (As issued, the New Bid Conditions were specifically applicable to only non-exempt Federal and Federally assisted construction projects.)	DIR	Accomplished 12/20/76
2.	Incorporate the requirement to comply with the New Model Federal EEO Bid Conditions into all construction contracts.	TD	Accomplished Continuous
3.	Assure that contracts concluded by the Agency contain the Equal Employment Opportunity and non-discrimination clauses required by UMTA and other Federal or State Agencies.	TD	Accomplished Continuous
4.	Establish procedures, as required, to assure understanding and compliance by contractors with the requirements of the New Model Federal EEO Bid Conditions, Executive Order 11246, and other applicable Federal, State or County policies and directives.	RO/ AAC	Accomplished Continuous
5.	Review contractor employment and related reports and make on-site inspection of contractor work forces as required to assure compliance with established EEO/Affirmative Action requirements. Initiate appropriate corrective action in instances where contractors are found to be in non-compliance.	RO/ AAC	Continuous

	Action	Action Office	Timetable
6.	Submit EEO/Affirmative Action reports, as required, to the Department of Labor and other appropriate Federal or State monitoring agencies.	RO	Continuous
7.	Incorporate in the annual report on the Agency Affirmative Action Program submitted to the County Board of Supervisors data reflecting the utilization of minorities and women by contractors engaged in Agency projects in relation to minority utilization goals established by the New Model Federal EEO Bid Conditions.	AAC	Continuous
8.	Accomplish the following actions in regard to consultant, research and other types of contracts and agreements not subject to the requirements of the New Model Federal EEO Bid Conditions:		
	a. Include requests for Affirmative Action Plan commitments in Requests for Proposals.	TD	Continuous
	b. Require that each proposal give the present level of minority utilization by consultant and his/her plans for minority utilization during the life of the contract. Utilization of women in roles from which they have traditionally been excluded will be evaluated in a similar manner to minority utilization.	TD	Continuous
	c. Incorporate the Affirmative Action commitment into the contract with the consultant selected.	TD	Continuous
	d. Require that upon contract completion, the consultant	TD/ ADD	Continuous

report the degree of conformance to his/her minority utilization plans. For contracts of long duration, provide for periodic reporting.

e.	Consider the degree to which consultants met their Affirmative Action commitments when negotiating additional contracts.	ADD	Continuous
9.	Provide Invitations-do-Bid, Requests for Proposals, etc., to the Agency Affirmative Action Coordinator prior to submission to the County Board of Supervisors to assure that applicable EEO/Affirmative Action requirements have been included.	ADD	Continuous

PART XI—PROGRAM UNDERSTANDING AND SUPPORT

A. *General*

1. For the Equal Employment Opportunity Program to attain effective results, all Agency managers and employees must be aware of the commitment of the County and Transit District Boards of Supervisors to the objectives and requirements of the Agency Program. Similarly, the Program must be publicized and made known to the community at large.

2. The following actions will be taken to enhance such understanding and to minimize development of antagonisms and apprehensions resulting from misconceptions about the program.

	Action	Action Office	Timetable
B.	*Within the Transportation Agency*		
1.	Provide sufficient copies of the Agency Affirmative Action Plan to the Agency Division Directors for distribution to supervisory personnel and interested employees.	AAC	1/15/79 Continuous

Action	Action Office	Timetable
2. Hold special meetings, as necessary, to acquaint Division Directors, supervisors and other employees with the Program, to include the following:	AAC	Continuous
a. County Equal Employment Opportunity Policy, adopted by the Board of Supervisors on August 7, 1971, and the objectives of the County Affirmative Action Program.		
b. Background and reasons for establishment of the County Affirmative Action Program and Agency EEO Program.		
c. Objectives of the Agency EEO Affirmative Action Program.		
d. Responsibilities of the Agency's Affirmative Action Coordinator, Division Directors, Personnel Officer and Supervisory personnel for implementation of the Agency EEO Affirmative Action Program.		
e. General manner in which the Agency program is administered and coordinated.		
f. Composition and distribution by sex, ethnic group and handicapped status of the County and Agency work force and the main areas where underutilization of these groups exists.		
g. Programs and actions underway or projected to correct areas of underutilization.		

	h. Actions required of supervisors and management personnel to assure understanding of the program by all Agency employees and to enhance attainment of the program's objectives.		
3.	Keep Division Directors informed of the status of the Agency Affirmative Action Program including problem areas and actions or support required from them to ensure attainment of the program's objectives.	AAC	Continuous
4.	Furnish Division Directors copies of the bi-monthly reports on the Agency Affirmative Action Program provided to the Director and, as appropriate, status reports submitted to the Board of Supervisors, Transportation Commission and other agencies.	AAC	Continuous
C.	*Outside the Transportation Agency*		
1.	Provide copies of the Agency EEO Plan to the following:	AAC	1/15/79 Continuous
	a. County Board of Supervisors, County Executive, County Transportation Commission, County Personnel Director, County Affirmative Action Officer, County Women's Coordinator, Commission on the Status of Women, Human Relations Commission, Affirmative Action Advisory Council and other County Agencies or individuals concerned with or interested in the Agency's EEO Program.		
	b. Civil Rights Officer, Region IX, UMTA; Civil Rights Officer, California Department of Transportation; Affirmative Action Officer, Metropolitan Transportation		

	Action	Action Office	Timetable
	Commission and other interested governmental agencies or individuals.		
	c. All local women's, ethnic minority and handicapped community groups which are interested or concerned with the County and Agency's EEO Programs, and other interested community groups and individuals.		
2.	Assist the Director in interpreting the Agency's Affirmative Action Program to interested community organizations and agencies and other elements of the public.	AAC	Continuous
3.	Maintain continuous liaison with local Commissions and community groups which demonstrate special interest in the Agency's Affirmative Action Program and strive to maintain their understanding and support of the program.	AAC	Continuous
4.	Keep the Agency Information Officer informed of significant developments in the program and items of special interest that may merit release to the news media or publication in Agency newsletters.	AAC	Continuous

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[Deleted Charts did not conform to Supreme Court printing specifications. See Supplemental Excerpt of Record pp. 61-74.]

ABBREVIATIONS AND DEFINTIONS

A. *Abbreviations for Action Responsible Persons*

1. AAC Affirmative Action Coordinator
2. ADD All Division Directors
3. ADM Director of Administration
4. AO Director of Aviation
5. APO Agency Personnel Officer
6. DIR Director, Transportation Agency
7. FO Director of Fleet Operations
8. RO Director of Roads Operations
9. SA Special Assistant to the Agency Director
10. TD Director of Transportation Development
11. TO Director of Transit Operations

B. *Ethnic Group Categories*

The concept of race as used by the Equal Employment Opportunity Commission does not denote clearcut scientific definitions of anthropological origins. For the purposes of this Plan, an employee may be included in the group to which he or she appears to belong, identifies with, or is regarded in the community as belonging. However, no person should be counted in more than one race/ethnic category.

The category "Hispanic" while not a race identification, is included as a separate ethnic category because of the employment discrimination often encountered by this group; for this reason do not include "Hispanic" under either "White" or "Black". For the purpose of this Plan, the following race/ethnic categories will be used:

1. The category "White" (not of Hispanic origin): All persons having origins in any of the original peoples of Europe, North Africa, the Middle East, or the Indian Subcontinent.

2. The category "Black" (not of Hispanic origin): All persons having origins in any of the Black racial groups.

3. The category "Hispanic": All persons of Mexican, Puerto Rican, Cuban, Central or South America or other Spanish culture or origin, regardless of race.

4. The category "Asian or Pacific Islanders": All persons having origins in any of the original peoples of the Far East, Southeast Asia, or the Pacific Islands. This area includes, for example, China, Japan, Korea and Samoa.

5. The category "American Indian or Alaskan Native": All persons having origins in any of the original peoples of North America.

6. The category "Filipino": Includes persons of Filipino descent.

C. Definition of Handicapped Persons (State of California Personnel Board Affirmative Action Guidelines for the Disabled)

1. *General*

a. A *Handicapped Person* as defined by Section 504 of the Rehabilitation Act of 1973 is a person who:

(1) Has a physical or mental impairment which substantially limits one or more of such person's life activities;

(2) Has a record of such impairment; or

(3) Is regarded as having such an impairment.

b. The term *handicapped individual* is synonymous with the term "disabled person" or "person with disabilities" or similar variations. The preferred term in the disabled community is "disabled", while the Federal legal and regulating term is "handicapped".

c. Generally, a *disability* is defined as a condition of impairment, physical or mental, having an objective aspect that can usually be described by a physician.

d. Conversely, a *handicap* is defined as the cumulative result of the obstacles which a disability interposes between the individual and his/her maximum functioning level.

2. Interpretation of Terms in Definition

a. *"Physical or mental impairments"* are not, in general, defined by listing specific conditions and diseases because of the difficulty of ensuring the comprehensiveness of any such list. The term includes, but is not limited to:

Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; sense organs;

respiratory; speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or any mental or psychological disorder, such as mental retardation, emotional or mental illness, and specific learning disabilities.

b. *"Major life activities"* means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.

c. *"Has a record of such impairment"* means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

d. *"Is regarded as having such an impairment"* means (1) has a physical or mental impairment that may not substantially limit major life activities but that is treated by an employer as constituting such a limitation; (2) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of other toward such impairment; or (3) has no impairments but is treated by an employer as having such an impairment.

3. A disabled person is substantially limited if such person is likely to experience difficulty in securing, retaining or advancing in employment because of a disability.

4. A disabled person is *qualified* when such person is capable of performing a particular job with reason-

able accommodation relative to such person's disability.

5. The above definition and interpretation identifies who may be considered disabled and should be included in affirmative action plans and programs for the disabled. Individuals with acute disabling conditions such as appendicitis, broken arms, pulled muscles, etc., which are not stabilized will not meet the definition of "disabled person" until the permanence of the residual medical impairment is determined and the condition has been demonstrated.

6. Affirmative action goals and timetables should be established for disabled persons with physical or mental impairments which with reasonable accommodation do not interfere with job performance.

   a. *Visual*—persons who are legally blind in one or both eyes and whose visual acuity even after correction (eyeglasses or contact lenses) is 20/200 visual acuity or restricted in the visual field to 20 degrees.

   b. *Hearing*—persons with total deafness or inability to hear a normal conversation and/or use a telephone without the aid of an assistive devise.

   c. *Speech*—persons with speech impairments when speech is unintelligible in normal conversation.

   d. *Physical*—persons with orthopedic impairments, amputations or functioning limitations if there is: (1) loss or significant impairment

of one or both upper extremities; (2) loss or significant impairment of one or both major lower extremities; and (3) impairments of the trunk, back, or spine when there is a medically diagnosed disability which substantially limits one or more major life activities.

e. *Development Disabilities*—persons who meet the legal definition or have been identified as developmentally disabled. This includes autism, cerebral palsy, epilepsy, mental retardation and other neurological impairments.

D. *Reasonable Accommodation For Handicapped Persons* (State of California Personnel Board Affirmative Action Guidelines for the Disabled)

1. Reasonable Accommodation

a. The Rehabilitation Act of 1973, Sections 503 and 504, require employers to make reasonable accommodation to the physical or mental limitations of a disabled applicant or employee. Reasonable accommodation is defined as efforts made on the part of the employer to remove artificial or real barriers which prevent or limit employment of disabled persons.

b. Reasonable accommodation, if needed, should be made available to all applicants and employees that meet the criteria of the State's definition of a "qualified disabled person".

c. This applies to all aspects of the personnel system beginning with the initial examination through the promotion process. It applies to

persons with all types and categories of impairments and includes applicants, new employees, current employees and reinstating employees. It is estimated that approximately five percent of the disabled applicants and employees will require exceptional consideration regarding reasonable accommodation.

2. Employment Opportunity

   a. Departments shall not deny any employment opportunity to a qualified disabled applicant or employee, if the basis for the denial is the need to make reasonable accommodation to the physical or mental limitations of the applicant or employee.

   b. Departments shall make reasonable accommodation to the known physical or mental limitations of qualified disabled applicants or employees, including persons who become disabled while employed with the State, unless the State agency can demonstrate that the accommodation would impose an undue hardship on the operation of its program.

3. Considerations in Providing Reasonable Accommodation

   The following factors may be considered by agencies in determining whether an accommodation would impose an undue hardship:

   a. The overall size of the program or agency with respect to the number of employees; number and type of facilities; and size of budget.

b. The type of agency operation, including the composition and structure of the agency's work force.

c. The nature and cost of the accommodation.

4. Individualized Accommodation

a. Reasonable accommodation means basically that each situation is approached on an individual basis. No preconceived ideas other than providing a qualified worker an opportunity to excel should be present.

b. The provision of reasonable accommodation may mean making physical changes to building structures, installation of specialized equipment, purchase of individual assistive devices, job site modification, job restructuring and related accommodations including the provision of readers and interpreters.

5. Provision of Reasonable Accommodation

It shall be the responsibility of the hiring agency to provide reasonable accommodation to qualified disabled applicants and employees. The provision of reasonable accommodation includes, but is not limited to the following:

a. *Equipment and Assistive Devices*—The provision of equipment may include: special telephone equipment; "talking" calculators; "one-handed" typewriters; closed-circuit televisions; specially designed desks; "TTY" telephone communication equipment; and other types of equipment to facilitate the per-

formance of job duties. The provision of assistive devices encompasses "off the shelf" devices as well as those custom designed for the individual's particular needs, such as, mouth sticks, communication devices, and related special equipment.

b. *Job Site Modification*—The planning and provision of accessibility to existing facilities may be required in order for disabled individuals to engage in work activities. Modifications may include adjustments to equipment height, addition of electrical outlets, rearrangement of furniture and equipment, widening doorways or the relocation of the job site to an accessible area, and other types of similar modifications.

c. *Job Restructuring*—The restructuring of jobs may include modifying work hours and/or changes in job duties while retaining the basic class criteria. Arrangements must be considered for full-time and permanent-intermittent employment. Job sharing and flexible hours will permit medical appointments, medical dietary requirements and other related needs of disabled employees.

d. *Support Services*—Support services include interpreters for deaf persons, readers for persons who have visual impairments, assistants for persons who are severely disabled, i.e., quadriplegia, and drivers for mobility limited persons. Persons providing support services shall not perform job tasks, but facilitate the employee's job performance.

E. *Description of Job Categories Identified in the Plan*

1. *Officials and Administrators:* Occupations in which employees set broad policies, exercise overall responsibility for execution of these policies, or direct individual departments or special phases of the Agency's operations, or provide specialized consultation on a regional, district or area basis. Includes: Department heads, bureau chiefs, division chiefs, directors, deputy directors, controllers, examiners, wardens, superintendents, sheriffs, police and fire chiefs, and inspectors and kindred workers.

2. *Professionals:* Occupations which require specialized and theoretical knowledge which is usually acquired through college training or through work experience and other training which provides comparable knowledge. Includes: personnel and labor relations workers, social workers, doctors, psychologists, registered nurses, economists, dieticians, lawyers, system analysts, accountants, engineers, employment and vocational rehabilitation counselors, teachers or instructors, police and fire captains and lieutenants and kindred workers.

3. *Technicians:* Occupations which require a combination of basic scientific or technical knowledge and manual skill which can be obtained through specialized post-secondary school education or through equivalent on-the-job training. Includes: computer programmers and operators, draftsmen, surveyors, licensed practical nurses, photographers, radio operators, technical illustrators, highway technicians, technicians (medical, dental, elec-

tronic, physical sciences), assessors, inspectors, police and fire sergeants and kindred workers.

4. *Protective Service Workers:* Occupations in which workers are entrusted with public safety, security and protection from destructive forces. Includes: police patrol officers, fire fighters, guards, deputy sheriffs, bailiffs, correctional officers, detectives, marshals, harbor patrol officers and kindred workers.

5. *Paraprofessionls:* Occupations in which workers perform some of the duties of a professional or technician in a supportive role, which usually require less formal training and/or experience normally required for professional or technical status. Such positions may fall within an identified pattern of staff development and promotion under a "New Careers" concept. Includes: library assistants, research assistants, medical aides, child support workers, police auxiliary, welfare service aides, recreation assistants, homemakers aides, home health aides and kindred workers.

6. *Office and Clerical:* Occupations in which workers are responsible for internal and external communication, recording and retrieval of data and/or information and other paperwork required in an office. Includes: bookkeepers, messengers, office machine operators, clerk-typists, stenographers, court transcribers, hearing reporters, statistical clerks, dispatchers, license distributors, payroll clerks and kindred workers.

7. *Skilled Craft Workers:* Occupations in which workers perform jobs which require special manual skill and a thorough and comprehensive knowledge of the processes involved in the work which is acquired through on-the-job training and experience or through apprenticeship or other formal training programs. Includes: mechanics and repairmen; electricians, heavy equipment operators, stationary engineers, skilled machining occupations, carpenters, compositors and typesetters and kindred workers.

8. *Service-Maintenance:* Occupations in which workers perform duties which result in or contribute to the comfort, convenience, hygiene or safety of the general public or which contribute to the upkeep and care of buildings, facilities or grounds of public property. Workers in this group may operate machinery. Includes: chauffeurs, laundry and dry cleaning operatives, truck drivers, bus drivers, garage laborers, custodial personnel, gardeners and groundskeepers, refuse collectors, construction laborers.

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COUNTY OF SANTA CLARA 299-2424 Area Code 408
CALIFORNIA

[ADDENDUM]

October 1981
TO: Department Heads/Appointing Authorities
FROM: Sally Reed, County Executive
SUBJECT: Affirmative Action

The County of Santa Clara is committed to an aggressive affirmative action policy. In order to assist you in meeting these goals in your department, the Personnel Department will be initiating a form (see below) to be attached to selective certification lists. The information will assure that you are aware of the affirmative action implications of each appointment. The form is not intended to dictate your department's appointments as effective management mandates that the most qualified person be appointed.

Following is the form to be attached to selective certification lists.

TO: Appointing Authority
FROM: Sally Reid, County Executive

The County of Santa Clara is committed to an aggressive affirmative action policy. The attached certification list is for a classification deficient in the protected groups checked. Affirmative action should be considered in filling this vacancy.

American Indians/Alaskan Natives	( )	Females	( )
Asians/Pacific Islander	( )	Filipinos	( )
Blacks	( )	Hispanics	( )
Disabled	( )		

An Equal Opportunity Employer

AFFIRMATIVE ACTION PLAN
COUNTY OF SANTA CLARA

Adopted October 16, 1979

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SANTA CLARA COUNTY BOARD OF SUPERVISORS EQUAL EMPLOYMENT OPPORTUNITY POLICY

It is the policy of the Santa Clara County Board of Supervisors that no person shall be discriminated against with regard to recruitment, selection, appointment, training, promotion, retention, discipline or other aspects of employment because of race, color, national origin, creed, religion, sex, age, disabled status, political beliefs, organizational affiliations and sexual orientation.

Further, it is the policy of the Board of Supervisors that affirmative, imaginative and continuing action will be taken to:

—Attain a work force in all Agencies and Departments which includes in all job categories minorities, women, and disabled persons in numbers consistent with the ratio of these groups in the Santa Clara County area work force.

—Remove all non-job related barriers to employment and promotion of minorities, women and disabled persons.

—Recruit, select and employ bilingual and bicultural persons in all categories as needed to provide adequate services to all segments of the Santa Clara County community with special emphasis toward the County's Spanish-speaking, Asian or Pacific Islanders and other significantly represented bilingual, bicultural groups.

The Board recognizes that these policies cannot be implemented solely through the prohibition of discriminatory employment practices. Continuing affirmative action must be taken to remedy the effects of past practices in order to develop a County work force whose make-up re-

flects the composition of the Santa Clara County community.

The Board of Supervisors charges and holds the County Executive accountable for developing, implementing and administering an Equal Employment Opportunity Affirmative Action Program to carry out these policies and employment objectives.

This Equal Employment Opportunity (EEO) Policy replaces Personnel Policy 200 adopted August 7, 1971. This EEO Policy and supporting Equal Employment Opportunity Affirmative Action Plan is approved this date, October 16, 1979.

/s/ Dominic L. Cortese, Chairperson
Board of Supervisors

EXECUTIVE DIRECTIVE TO DEPARTMENT AND AGENCY DIRECTORS

The Santa Clara County Board of Supervisors has established as a primary goal the attainment of a County work force whose composition in all County Departments and Agencies includes women, disabled persons and ethnic minorities in a ratio in all job categories that reflects their distribution in the Santa Clara County area work force.

To accomplish this goal, the Board has approved this Equal Employment Opportunity (EEO) Affirmative Action Plan. It sets forth the actions to be accomplished, assigns responsibility and establishes timetables for their accomplishment.

All County Department/Agency Directors shall give top priority toward meeting the requirements of the Plan

pertaining to their areas of responsibility. I expect each Director to serve as the Affirmative Action Officer for his/her organization and to personally assure that all applicable actions outlined in this EEO Affirmative Action Plan are accomplished effectively in accordance with the established timetables. Each Director will be held personally responsible and accountable for development and effective implementation of a supporting Department/Agency EEO Affirmative Action Plan for their organization.

Department/Agency Directors may appoint an Affirmative Action Coordinator to provide the staff guidance and coordination necessary to carry out the Equal Employment Opportunity responsibilities applicable to their organization. However, such individuals must be persons in top management positions which report directly to the Department/Agency Director for purposes of Affirmative Action coordination.

Implementation of the County's EEO Affirmative Action Plan and the individual Department/Agency Affirmative Action Plans should result in a statistically, measurable improvement in the representation of women, minorities and disabled persons in all major County job classifications where these groups are currently underrepresented.

The progress made by each County Department/Agency toward attainment of their established employment goals shall be reviewed each year during the Board's consideration of the annual Departmental/Agency budget.

I will be developing an annual evaluation plan for County managers for whom I have appointment respon-

sibility. An important feature of this evaluation plan will be the adequacy of their efforts to comply with the Board of Supervisors EEO Policy and to comply with the requirements of the County EEO Plan applicable to their organization.

/s/ William M. Siegel
County Executive

RESPONSIBILITIES

The County's Equal Employment Opportunity (EEO) Affirmative Action Program is an integral part of the County's Personnel Management System. Responsibility for its implementation lies with the County Executive. This responsibility is executed through the Equal Opportunities Division within the County Executive's Office, the County Personnel Department and the Directors of the individual County Departments and Agencies.

A. *County Executive*

The County Executive is accountable to the Board of Supervisors for development, implementation and administration of the County's EEO Affirmative Action Plan. This Plan, approved by the Board of Supervisors, outlines and assigns responsibility for accomplishment of the actions to be taken to implement the Board's EEO Policy and to comply with Federal and State Equal Opportunity requirements applicable to the County.

The County Executive shall ensure that all County Department/Agency Directors aggressively and effectively carry out the responsibilities assigned them under the Plan.

B. *County Equal Opportunities Director*

The County Equal Opportunities Director (EOD) will report directly to the County Executive and serve as his/her principal staff assistant for the administration of the County's EEO Affirmative Action Program. The EOD will attend the County Executive's regular Department/Agency Director staff meetings and other top level management meetings concerned with EEO issues and decisions. The EOD will be provided access to all pertinent employment data, including but not limited to test results and certification lists within the County Personnel Department and other Departments/Agencies as needed to carry out his/her responsibilities.

The EOD will be responsible for supervision of the County Equal Opportunities Division. The Division will include a Women's Coordinator, a Minority Coordinator, and a Disabled Equal Opportunity Program Coordinator.

Specific Responsibilities of the Equal Opportunities Division include:

1. Monitoring and coordinating the Plan's implementation and related County Affirmative Action activities. Developing program guidance. Identifying problem areas and actions required for resolution.
2. Providing the County Departments/Agencies, County Council on Equal Employment Opportunities and interested community groups an adequate continuing opportunity to recommend changes for improvement of the EEO Affirmative Action Program and to express their views relative to any major changes in the Program that may be proposed.

3. Revising the County EEO Affirmative Action Plan as needed to adequately address all major actions that need to be taken to attain the Program's objectives.
4. Providing assistance and guidance to all County Department/Agency Directors as required to assure accomplishment of the affirmative action tasks and activities outlined in the Plan applicable to their functional areas of responsibility.
5. Undertaking specific programs to help the County Departments/Agencies identify and remove unnecessary barriers that have kept the County from attaining a work force that reflects the sex and ethnic composition of the Santa Clara County area work force and to work in partnership with Departments/Agencies to develop and implement creative ways to produce desired Affirmative Action results.
6. Assisting the County Personnel Department and Departmental Personnel staffs to the maximum degree possible to carry out recruitment activities essential to attainment of the County EEO Plan's employment objectives. This shall include assuming a major role in the development and implementation of recruitment programs, techniques and methods to make protected group members aware of County job opportunities and to motivate them to compete for positions in job classifications where they are underrepresented.
7. Ensuring compliance with all requirements pertaining to the employment of disabled persons established by Section 503 and 504 of the Rehabilitation Act of 1973, California Code Sections 19230-19237 (AB 1309) and other related Federal and State Directives.
8. Keeping the County Executive and Department/Agency Directors informed of the status of the County

EEO Affirmative Action Program, including problem areas and actions required for successful attainment of the Program's objectives.

9. Assisting the County Executive to interpret the program to interested community agencies and individuals and keeping the County Board of Supervisors and other appropriate individuals and activities informed of the status of the Program.

10. Serving as staff to the County Council on Equal Employment Opportunities.

C. *County Personnel Director*

The tasks that shall be accomplished to attain the objectives of the County Affirmative Action Program are primarily concerned with the Personnel steps to be taken in recruitment and selection, position classification, training and upgrading and other actions necessary to provide maximum employment and career progression opportunities to women, minorities and disabled persons in job classifications where they are underrepresented.

The Director, County Personnel Department is responsible for accomplishing a broad range of actions in these Personnel areas and total spectrum of the Personnel process that directly affect the capability of the County Departments/Agencies to carry out the requirements of the County's EEO Affirmative Action Program applicable to them.

Thus, major responsibility for successful implementation of the Program resides with the County Personnel Director. Successful attainment of the Program's employment objectives will be largely dependent on the initiative, imagination and resourcefulness of the Coun-

ty Personnel Department's staff in cooperation with the Equal Opportunities Division in carrying out the varied complex tasks that need to be centrally accomplished to permit attainment of the goals applicable to individual County Departments/Agencies

D. *County Department/Agency Directors*

Each County Department/Agency Director is personally responsible for assuring accomplishment of all tasks set forth in the County's EEO Affirmative Action Plan applicable to their Departments/Agencies. This includes establishment of employment goals and, in cooperation with the County Equal Opportunities Division, development of a Department/Agency Affirmative Action Plan that identifies Department/Agency objectives, assigns responsibility and establishes timetables for the tasks to be accomplished to ensure attainment.

For Affirmative Action Program coordination, each Department/Agency Director will either personally administer his/her applicable EEO Affirmative Action Plan or assign this responsibility to a person in a top level management position that reports directly to them.

Every County Department/Agency Director shall aggressively pursue implementation of the County EEO Affirmative Action Program and attainment of its objectives.

The degree to which each Department/Agency attains its EEO Affirmative Action goals will provide a direct measure of that Department/Agency Director's commitment and effectiveness in implementing and carrying out the EEO Policy established by the County Board of Supervisors.

The County Executive will consider the commitment to and results attained by each Department/Agency Director in carrying out the Board of Supervisors EEO Policy as an important element in evaluating their effectiveness as managers.

E. *Council on Equal Employment Opportunities*

The Council on Equal Employment Opportunities (CEEO) will serve in an advisory capacity to the County Board of Supervisors, County Executive and County Equal Opportunities Director in regards to development, implementation and administration of the County EEO Affirmative Action Program. CEEO will monitor and evaluate the program and recommend action, as deemed appropriate, to ensure that equitable employment training and upgrading opportunities are provided minorities, women and disabled persons in all County employment areas and job levels. Also, it will recommend actions considered necessary to enhance attainment of the County EEO Plan's employment objectives. The make-up of the Council, scope of its responsibilities and authority and operational procedures are as outlined in Chapter VII to Division A-25 of the Santa Clara County Ordinance Code and the Council's By-Laws as approved by the County Board of Supervisors.

PART I
EMPLOYMENT GOALS

A. *Long-Range Employment Goals*

1. The County's long-range Equal Employment Opportunity goal is to attain a work force whose composition in all job classifications and employment levels reflects the distribution of women, minority

and disabled persons in the Santa Clara County area work force.

2. The County long-range employment goals established for women, minority groups and disabled persons are outlined below. The goals are based on the demographics of these groups in the area work force as indicated in the 1970 Census.

Females	36.4%	American Indian or Alaskan Native	0.4%*
Hispanic	14.8%		
Black	1.6%	Filipino	0.6%*
Asian or Pacific Islanders	2.3%*	Disabled Persons	6.5%*

*Population Data—work force statistics not available.

The goals indicated above, except for the category "Female", include attainment of percentages of women within individual ethnic minority and "Disabled Persons" categories consistent with the distribution of women in these categories in the Santa Clara County area work force.

3. The County long-range goals outlined above will be revised when the 1980 Census is published in accordance with the 1980 Census findings. Also, a determination will be made based on the 1980 Census findings as to the desirability of establishing more definitive goals within each of the "Protected Group" categories.

4. Goal Attainment Process

A number of factors make it more difficult to attain the County's Equal Opportunity employment goals in some job classifications than in others. Consequently, the goal is to attain the Plan's employment objectives by successive stages as follows:

a. By major job category for the overall County, as established by the U.S. Employment Opportunity Commission:

1) Officials and Administrators

2) Professionals

3) Technicians

4) Protective Service Workers

5) Para-Professionals

6) Office and Clerical

7) Skilled Craft Workers

8) Service and Maintenance

b. By Department/Agency and major job classification (e.g., Lawyers, Nurses, Engineers, Management Analysts, Bus Mechanics, etc.).

B. *Yearly Employment Goals*

1. The long-range parity employment goals for women, minorities and disabled persons established by the County Board of Supervisors EEO Policy can best be attained by setting realistic yearly employment goals for each County Department and Agency. Such short-term yearly goals are necessary to permit:

a. Establishment of realistic goals for individual County Departments and Agencies that are based on specific deficiencies existing in their work forces and the best known projections of positions to be filled during the year in job classifications where women, minorities or disabled persons are underrepresented.

NOTE: The "goals" established for each County Department/Agency should not be construed as "quotas" that must be met. The "goals" should rather be seen as realistic desired levels of achievement correcting imbalances in a Department/Agency work force. Goals should take into account such factors as turnover, layoffs, lateral transfers, new job openings, retirements and availability of minorities, women and disabled persons in the area work force who possess the desired qualifications or potential for placement. Recognition should be given the fact that it will take longer to correct imbalances in job classifications requiring specialized education and professional skills than it will in other occupations.

b. Adjustment of County EEO hiring goals as may be dictated by expansions of County programs or by limitations on hiring or reductions in the County work force resulting from financial restrictions imposed by Proposition 13 or other factors.

c. To facilitate review by the Board of Supervisors of progress made by Departments/Agencies toward attainment of their yearly EEO employment goals, the Affirmative Action Year will be considered as starting on October 1 of one year and terminating on September 30 of the following year.

2. To establish a uniform goal development process, including standardized formats, the Equal Opportunities Division will develop and provide to De-

partments/Agencies by June 1 of each year written guidelines for development of their yearly EEO Plans. These plans will cover the coming Affirmative Action Year which will begin October 1 and extend through September 30 of the following year. The guidelines will provide guidance for accomplishment of the following:

a. A Work Force Utilization Analysis of the Department/Agency work force that identifies existing deficiencies in the representation of women, minorities and disabled persons.

b. Establishment of realistic yearly employment goals to increase the representation of women, minorities and disabled persons in EEOC job categories and job classifications where these groups are underrepresented.

c. Development of individual Department/Agency EEO Plans outlining the special efforts to be made to attain the established yearly EEO hiring goals (see PART VIII Departmental/Agency Affirmative Action Plans for definitive requirements).

3. The guidance furnished Departments/Agencies for establishment of their yearly EEO employment goals will provide for review of these goals as of March 31, the mid-point of the Affirmative Action Year. This review will be accomplished by all Departments/Agencies. If changes in employment goals are dictated because of significant expansions or contractions of Department/Agency programs, revised goals will be established in cooperation with the Equal Opportunities Division.

PART II

ANALYSIS OF CURRENT CONDITIONS

A. *Work Force Utilization Analysis*

This section outlines the various analysis to be made of the County's work force. Purposes of these analyses are to:

1. Provide a comprehensive statistical picture of the composition and distribution of the County work force by EEOC job category, sex, disabled status and individual ethnic groups (Hispanics, Blacks, Asians or Pacific Islanders, American Indians or Alaskan Natives, and Filipinos).
2. Identify the specific employment areas where minorities, women, and disabled persons are underrepresented and the attention of the County Executive and Department/Agency Directors is particularly required, to ensure acceptable progress toward attainment of the County's EEO employment goals.
3. Establish basic benchmarks from which to measure future progress toward attainment of the employment objectives established by the County and Departmental EEO Affirmative Action plans.
4. Accomplish a continuing evaluation of progress made toward attainment of the County's employment goals and to identify areas where increased management attention and emphasis is required to enhance their successful achievement.

B. *Analyses Tasks*

1. Review by December 31, 1979, in cooperation with Departmental Personnel Officers as appropriate,

the categorization of all County and Transit District job classifications and assure proper allocation into the eight major job categories established by the Equal Employment Opportunity Commission (EEOC). Establish procedures to be followed in allocating newly established job classifications into appropriate EEOC job categories. Accomplish a continuing review annually as of December 31 to assure proper allocation of job classifications in accordance with the EEOC guidelines pertaining to the EEOC EEO-4 annual reporting requirement. . . .

* * *

5. *Paraprofessionals:* Occupations in which workers perform some of the duties of a professional or technician in a supportive role, which usually require less formal training and/or experience normally required for professional or technical status. Such positions may fall within an identified pattern of staff development and promotion under a "New Careers" concept. Includes: library, assistants, medical aides, child support workers, police auxiliary, welfare service aides, recreation assistants, homemakers aides, home health aides and kindred workers.

6. *Office and Clerical:* Occupations in which workers are responsible for internal and external communications, recording and retrieval of data and/or information and other paperwork required in an office. Includes: bookkeepers, messengers, office machine operators, clerk-typists, stenographers, court transcribers, hearing reporters, statistical clerks, dispatchers, license distributors, payroll clerks and kindred workers.

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8. *Service-Maintenance:* Occupations in which workers perform duties which result in or contribute to the comfort, convenience, hygiene or safety of the general public or which contribute to the upkeep and care of buildings, facilities or grounds of public property. Workers in this group may operate machinery. Includes: chauffeurs, laundry and dry cleaning operatives, truck drivers, bus drivers, garage laborers, custodial personnel, gardeners and groundkeepers, refuse collectors, construction laborers.

GLOSSARY OF TERMS

AFFECTED CLASS—those groups of minorities, females, the elderly, and the disabled who by virtue of past discrimination continue to suffer the effects of such discrimination. Affected class status must be determined by analysis or court decision.

AFFIRMATIVE ACTION—any activity initiated by an employer which contributes toward the greater utilization

of minorities, females, the elderly, and the disabled, including goals established by units and timetables for completion.

AFFIRMATIVE ACTION PROGRAM—Affirmative Action Program is a set of specific and result-oriented procedures to which an organization commits itself to apply every good effort. The objectives of those procedures plus such efforts is equal employment opportunity. Procedures without effort to make them work are meaningless; and effort, undirected by specific and meaningful procedures, is inadequate. An acceptable Affirmative Action Program must include an analysis of areas within which the organization is deficient in the utilization of minority groups, women and disabled, and further, goals and timetables to which the organization's good faith efforts must be directed to correct the deficiencies and, thus to achieve prompt and full utilization of minorities, women and disabled at all levels and in all segments of the work force where deficiencies exist.

CIVIL RIGHTS ACT OF 1964 (TITLE VII) AS AMENDED BY THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972—the first legislation to make it an unlawful employment practice to discriminate on the basis of race, color, religion, sex, or natural origin. All other Federal and State EEO Legislation is patterned after or supportive of TITLE VII.

DISPARATE EFFECT OR DISPARATE IMPACT—the result of an employment policy, practice, or procedure that, in practical application, has less favorable consequences for an affirmative action group than for the dominant group.

AGENCYWIDE PARITY—when the proportion of affirmative action groups in the external labor market is equiv-

alent to their proportion in the County work force without reference to classification.

EEOC—a Federal Commission on Equal Employment Opportunity which has the power to bring suits, subpoena witnesses, issue guidelines which have the force of law, render decisions, provide technical assistance to employers, provide legal assistance to complainants, etc.

GOALS—good faith quantitative objectives which an employer voluntarily sets as the minimum progress he/she can make within a certain time period through his/her all out efforts at outreach recruitment, validating selection criteria, creation of trainee positions, career ladders, etc. Goals and objectives are considered proper and legal responses to underutilization by Federal and State compliance agencies.

HUMAN RELATIONS TRAINING—interpersonal skill development, especially with respect to affirmative action group awareness, communication, and compatible attitude development. Techniques may include seminars, workshops, role reversal, attitude assessment, etc.

OBJECTIVES—similar to goals, a good faith effort to meet numerical goals through modifications in the employment procedures and practice. Goals and objectives are set after careful external and internal labor analysis.

OCCUPATIONAL PARITY—when the proportion of affirmative action group employees in all occupational levels is equivalent to their respective availability in the external labor market. Eventually, with the goal of equal educational and training opportunities, agencywide parity and occupational parity will be equal.

PARITY—the long-term goal of affirmative action which is reached when employment and occupational parity are identical.

PROTECTED CLASS—legally identified groups that are specifically protected by statute against employment discrimination. Unlike "affected class" which must be demonstrated, protected class status is automatically conferred upon recognized minority group members, females, disabled, by virtue of the law or other court decisions interpreting the law.

QUOTAS—fixed hiring and promotion rates based on race, sex, etc., which must be met at all costs and do not take into consideration the availability, education, or training of the external labor force of protected class members, nor the employers internal labor situation with respect to projected manpower requirements. Quotas are considered to be last resort measures available only for the courts to impose when good faith efforts do not exist.

TIMETABLES—consecutive time durations (generally in affirmative action, a timetable covers one year) during which the specific quantitative goals and objectives for that year are to be met and evaluations of progress are made before beginning the subsequent timetable with its own specific goals and objectives.

UNDERUTILIZATION—term used to describe a lower number of affirmative action group employees than parity would predict. Once underutilization is quantitatively established, the burden of proof rests on the employer to demonstrate that the underutilization is the legitimate effect of valid criteria of business necessity; (also called underrepresentation).

VALIDITY—the extent to which a test, criterion, or qualification measures the trait (some job performance ability) for which it is being used, rather than some other trait. "Business necessity" considerations are addressed to the usefulness of the test in predicting job performance and the minimum cut-off scores.

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299-2111 Area Code 408

COUNTY OF SANTA CLARA
CALIFORNIA

Selby Brown, Jr., County Counsel

May 24, 1982

Hon. William A. Ingram
United States District Court
175 W. Taylor St.
San Jose, California

Attn: Jim Waggener,
Courtroom Deputy

Re: Paul E. Johnson v. Transportation Agency, Santa Clara County
No. C-81-1218 WAI (SJ)

Dear Judge Ingram:

Enclosed are proposed Findings of Fact in the Paul Johnson case. Enclosed also is the current annual Affirmative Action Plan for the Transportation Agency, effective January 1, 1982. This Plan is submitted in response to your question as to whether or not the County's Plan has a fixed

term. Mr. Dawson has indicated that he has no objection to the submission of the current Agency Plan.

Very truly yours,
SELBY BROWN, JR.
County Counsel

SW:bc /s/ By STEVEN WOODSIDE
Encls. Deputy County Counsel
cc: James L. Dawson

An Equal Opportunity Employer

AFFIRMATIVE ACTION PLAN
County of Santa Clara
TRANSPORTATION AGENCY

Section One:
POLICY

Transportation Agency
1555 Berger Drive
San Jose, California 95112

COUNTY OF SANTA CLARA
CALIFORNIA

SANTA CLARA COUNTY AND TRANSIT DISTRICT
EQUAL EMPLOYMENT OPPORTUNITY POLICY

It is the policy of the Santa Clara County and Transit District Boards of Supervisors that no person shall knowingly be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity conducted by Santa Clara County on the grounds of race, color, national origin, religion, sex, age or handicapped status.

Further, it is the policy of the County and Transit District Boards of Supervisors that no person shall knowingly be discriminated against with regard to recruitment, selection, appointment, training, promotion, retention, discipline

or other aspects of employment because of race, color, national origin, religion, sex, age, or handicapped status.

It is the goal of the County and Transit District to attain a work force which includes, in all occupational fields and at all employment levels, minorities, women and handicapped persons in numbers consistent with the ratio of these groups in the area work force.

The County and Transit District Boards of Supervisors recognize that mere prohibition of discriminatory practices is not enough to remedy the effects of past practices and to permit attainment of an equitable representation of minorities, women and handicapped persons. Affirmative, aggressive, continuing actions are required to attain this goal.

Consequently, it is the will of the County and Transit District Boards of Supervisors that the Transportation Agency take affirmative continuing action as required to assure that:

a. Employment by the Agency is kept freely open to all persons regardless of race, color, national origin, religion, sex, age or handicapped status.

b. Any possible barriers to employment and promotion of minorities, women and handicapped persons are removed.

c. Aggressive and imaginative continuing efforts are made to attract and assist minorities, women and handicapped persons to qualify for employment and promotion as needed to attain an equitable representation in all occupational fields and at all job levels.

d. Bilingual and bicultural persons are recruited, selected and employed in all job classifications as needed to provide equitable service to all bilingual, bicultural segments of the community with special emphasis toward the County's Spanish-speaking residents and other large identifiable groups.

The attached Santa Clara County Transportation Agency Equal Employment Opportunity/Affirmative Action Plan outlines the actions to be taken to implement the Equal Employment Opportunity Policy outlined above. This Plan is approved effective January 1, 1982.

/s/ Susanne Wilson, Chairperson
Santa Clara County Board of Supervisors

/s/ Rod Diridon, Chairperson
Santa Clara County Transit District

Transportation Agency
1555 Berger Drive
San Jose, California 95112

COUNTY OF SANTA CLARA
CALIFORNIA

FOREWORD

SANTA CLARA COUNTY
TRANSPORTATION AGENCY
EQUAL EMPLOYMENT OPPORTUNITY/
AFFIRMATIVE ACTION PLAN

The Santa Clara County Transportation Agency Equal Employment Opportunity (EEO) Affirmative Action Plan sets forth the actions to be taken to comply with the Equal Employment Opportunity policy established by the County and Transit District Boards of Supervisors and Urban Mass Transportation Administration EEO requirements.

Development and implementation of the Agency EEO Affirmative Action Plan ultimately rests with the Transportation Agency Director. The Agency EEO Program, however, is an integral part of the County Affirmative Action Program as well as closely tied to County Personnel Office for employment lists. Therefore, it is expected that the Directors of Personnel, EOD and Transportation Agency will aggressively and cooperatively strive to carry out the personnel actions for which they are responsible and accountable to attain the objectives of the Agency EEO Program.

/s/ Sally Reed
County Executive

Transportation Agency
1555 Berger Drive
San Jose, California 95112

COUNTY OF SANTA CLARA
CALIFORNIA

PREFACE

SANTA CLARA COUNTY TRANSPORTATION AGENCY EQUAL EMPLOYMENT OPPORTUNITY/ AFFIRMATIVE ACTION PLAN

As stated by the Santa Clara County and Transit District Boards of Supervisors, no person shall knowingly be discriminated against with regard to recruitment, selection, appointment, training, promotion, retention, origin, religion, sex, age, or handicapped status.

It is the goal of the Transportation Agency to attain an Agency work force whose composition truly reflects the ethnic and gender makeup of the area work force. Concur-

rently, it is the Agency's goal to provide disabled persons equitable employment opportunities.

Consequently, the Agency's Affirmative Action Plan will outline and define policies and procedures as well as specify each employee's responsibility in regard to the affirmative action policies.

Primary responsibility for accomplishment of many of the personnel actions outlined in the Plan necessarily resides with the Agency Personnel Officer. Therefore, it is the intention of the Transportation Agency to smoothly and effectively integrate the foregoing plan of action within the Agency's overall personnel process. In addition, it is recognized that all Division Directors and supervisory personnel share significant responsibilities for implementation of the actions pertaining to their functional areas. The degree to which each Agency division attains the Plan's objectives will provide a direct measure of that Division Director's personal commitment to the EEO Policy established by the County and Transit District Boards of Supervisors and will be noted accordingly.

The Agency EEO Affirmative Action Plan will serve as an action guide to bring about equitable employment opportunities and will be given genuine priority.

/s/ James H. Graebner, Director
Transportation Agency

Transportation Agency
1555 Berger Drive
San Jose, California 95112

COUNTY OF SANTA CLARA
CALIFORNIA

SANTA CLARA COUNTY TRANSPORTATION AGENCY EQUAL EMPLOYMENT OPPORTUNITY/ AFFIRMATIVE ACTION PLAN

STATEMENT OF PURPOSE

The purpose of this document is to set forth the policies and procedures by which the Transportation Agency will implement its Affirmative Action Program and, in addition, to authorize the implementation, where necessary and legally permissible, of result-oriented personnel and employment procedures and activities which are relevant to equal employment and affirmative action. These procedures may include, but are not limited to, recruitment, hiring, appointment, work assignment, promotion, treatment during employment, pay, selection for training, discipline, or termination.

Section I specifically delineates the Agency's policy on equal employment opportunity as well as outlines the delegation of duties and responsibilities in this regard.

Section II, which is a more detailed specific course of action, describes the Agency's Affirmative Action Program for 1982. This section will:

1. Present an analysis of the composition and distribution of the existing Agency work force and establish equal opportunities/affirmative action employment goals for the Transportation Agency;
2. Identify the major actions to be accomplished to carry out the Santa Clara County and Transit District Equal Employment Opportunity Policy; and

3. Enumerate general recommendations to be followed for the implementation of affirmative action.

PLAN BACKGROUND AND HISTORY

On August 7, 1971, the Santa Clara County Board of Supervisors adopted an Equal Employment Opportunity Policy, subsequently established as General Policy 200. This Policy declared that:

—The County of Santa Clara has a clear responsibility for establishment of equal employment opportunity in a clear and positive sense at all levels of County Government and should provide exemplary leadership to all other employers in the metropolitan area in making equal employment opportunity a reality for all persons.

—Priority attention should be given to analysis of the service needs of minority persons.

—In addition, steps should be taken as necessary to recruit, train and deploy bilingual, bicultural staff to provide services equitably to all bicultural members of the community with special emphasis toward the County's Spanish-speaking residents and other large identifiable groups.

On October 7, 1972, the County Board of Supervisors adopted a five-year County Affirmative Action Plan which established a County Affirmative Action Program and provided guidelines for its implementation.

On September 8, 1975, the County Board of Supervisors approved a comprehensive Affirmative Action Plan for the Transportation Agency. This Plan incorporated the Equal Employment Opportunity Policy adopted by the Board of Supervisors on August 7. 1971. Also, it incorporated an Affirmative Action Program to assure compliance with this policy and requirements imposed by the Urban Mass Transportation Administration (UMTA) and other Federal or State agencies. Additionally, it incorpo-

rated an Affirmative Action Program concerned with monitoring and assuring compliance by construction contractors and consultants involved in Agency projects with Federal, State and Santa Clara County Equal Employment/Affirmative Action requirements.

On March 1, 1978, UMTA Circular 1155.1, "UMTA Interim Equal Employment Opportunity Policy and Requirements for Grant Recipients," became applicable to UMTA grant applicants. The purpose of the Circular was to clarify and strengthen equal employment opportunity procedures for UMTA grant recipients by requiring submission of written equal employment opportunity plans and approval of such plans by UMTA.

The Rehabilitation Act of 1973, commonly referred to as "The Handicapped Civil Rights Law," is to the disabled what the Civil Rights Act of 1964 is to minorities and women. The Act is an extension of affirmative action and nondiscrimination to disabled persons. Section 504 of the Act provides that handicapped individuals shall *not* be excluded from participation in, be denied the benefits of or be subjected to discrimination under any program or activity receiving Federal assistance. The Act requires that an employer make reasonable accommodation to the disabilities of applicants and employees unless it can be demonstrated by the employer that accommodations would impose an undue hardship on the operation of the activity.

California Code Sections 19230-19237 (AB 1309) established that: Effective January 1, 1978, it is the policy of the State of California to encourage and enable disabled persons to participate fully in the social and economic life of the State and to engage in remunerative employment. Furthermore, it established as State policy that qualified*

*A disabled person is qualified when such person is capable of performing the job with reasonable accommodation relative to such person's disability.

disabled persons shall be employed in State service in the political subdivisions of the State, in public schools and in all other employment supported in whole or in part by public funds. Disabled persons are to be employed on the same terms and conditions as the nondisabled, unless it is shown that the particular disability is job-related.

The Santa Clara County Transportation Agency Equal Employment Opportunity/Affirmative Action Plan incorporates the UMTA Interim EEO Policy and Requirements and other Federal, State, and County requirements applicable to the Agency.

DISSEMINATION OF THE AFFIRMATIVE ACTION POLICY

It will be the responsibility of the Affirmative Action Coordinator to ensure that all interested parties are informed of the Transportation Agency's Affirmative Action Program.

—Internal: All employees will be notified of the Agency's Affirmative Action Program with an emphasis on supervisors and managers understanding the active role they are to play in the implementation of the Plan. In addition, employees will receive a copy of the Agency's policy on equal employment opportunities. Copies of the Agency's Affirmative Action Plan will be available at each facility.

—External: Copies of the Agency's Affirmative Action Plan will be given to the County Board of Supervisors, County Executive and to recruiting sources utilized by the Agency. In addition, a copy of the Affirmative Action Plan will be available for public inspection at the office of the Affirmative Action Coordinator during normal working hours.

WORK FORCE ANALYSIS

In order to realistically develop an Affirmative Action Plan, it will be necessary to determine the composition of the existing work force by gender and racial groups within the following EEOC job and protected-group categories:

EEOC Job Categories

—Officials and Administrators
—Professionals
—Technicians
—Protective Service Workers
—Office and Clerical
—Skilled Craft Workers
—Service and Maintenance

Protected-Group Categories

—Female
—Hispanic
—Asian/Pacific Islander
—Black
—American Indian

The statistical composition will then be compared to the selected relevant work force. Employment projections and goals will be based, in part, on the work force analysis. Other factors which will determine the numerical goals for the Transportation Agency will include the utilization analysis, budget considerations, employee turnover, increase or decrease in authorized work force, collective bargaining agreements, program requirements, and the competitive labor market. Projections and goals will be clearly defined each year in consultation with Division Directors and other appropriate staff.

CORRECTIVE ACTION

Remedying the effects of past employment practices which may have excluded the appointment and promotion of ethnic/racial minorities and women at various levels of the work force is one of the objectives of the Affirmative Action Plan. Affirmative action activities shall include the review of employment and personnel practices to determine factors that may be contributing to the imbalance. It is the responsibility of the Affirmative Action Coordinator to determine if there are any practices within the employment process that may constitute artificial barriers to equal employment opportunity to women and ethnic/racial minorities; and, if so identified, take the necessary action to eliminate those artificial barriers.

* * *

[Deleted Chart did not conform to Supreme Court printing specifications. See Supplemental Excerpt of Record p. 84.]

EMPLOYMENT PROJECTIONS AND GOALS

Any projection of positions to be filled during 1982 is difficult to make in light of the fiscal-crisis and subsequent County-wide hiring freeze. In addition, other critical factors which must be considered are:

1. The Transportation Agency is not growing at the same rapid rate of past years;
2. There is an anticipated cut in transportation subsidies from both Federal and State funding sources; and
3. The current hiring freeze will dictate procedures for new positions to be filled within the Agency.

Based on the aforementioned influencing factors as well as 1981 selection patterns (Chart IV), new positions which are likely to open up during 1982 will fall in the following categories:

EEOC JOB CATEGORIES

Officials and Administrators	0
Professionals	3
Technicians	10
Office and Clerical	0
Skilled Craft	55
Service and Maintenance	126

For those positions opening up in the Professional category, a realistic goal of two positions filled by protected-group members is set. Five of the anticipated ten positions will hopefully be filled by ethnic minorities or women in the Technician category.

The Office and Clerical category is above parity. There will be approximately 55 positions in Skilled Craft. A goal of three women is targeted for this group. The percentage of minorities already represented in the Skilled Craft category, on the other hand, is 47%.

Although there has been an intensive recruiting program for women coach operators, the openings in 1982 will be for part-time positions only. In addition, as each year has passed, the list of operators with higher seniority gets longer and longer. These two factors will greatly influence the number of women who accept positions as coach operators. Moreover, the approximate 25 positions likely to open up in the maintenance area have already established lists. Given these factors, a realistic goal to set for Service and Maintenance hires is 35% of the protected-groups including women.

Chart IV

1981 SELECTION FIGURES

EEOC Job Categories	Hires	Promotions	Provisional
Officials and Administrators	1	2	
Professionals	10	13	2
Technicians	26	25	1
Protective Services			
Office and Clerical	78	28	3
Skilled Craft	30	4	4
Service and Maintenance	276	28	3
TOTAL	411	100	13

With the uncertainty of all the variables to be considered, employment projections for this year are tenuous at best. However, for this very reason, it becomes even more critical that stringent monitoring occur of any selections made within the Agency. The ultimate test of affirmative action is selections made rather than projections presented.

Therefore, the following steps will be recommended for the Agency:

1. All appointments to be made in categories in which underrepresentation exists will receive special attention. Top priority will be given to utilizing the "red-tag" form recommended by the County Executive to alert the appointing manager of the disparity within that job category (see addendum).
2. Division Directors will be held accountable for all appointments made within their respective divisions. When an appointment is made that does not include a member of the protected-classes, the Affirmative Action Coordinator will be informed before the appointment is made.
3. Managers will be apprised of this policy by the Division Directors who are ultimately responsible for affirmative action within their respective divisions.

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A Professional Corporation
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Attorneys for Service Employees
International Union Local No. 715

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-81-1218 WAI (SJ)

PAUL E. JOHNSON,

Plaintiff,

v.

TRANSPORTATION AGENCY, SANTA CLARA COUNTY, CALIFORNIA,

Defendant,

and

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL NO. 715,

Intervenor.

DECLARATION OF KRISTINA M. SERMERSHEIM IN SUPPORT OF MOTION FOR INTERVENTION

DATE: October 25, 1982

TIME: 10:00 a.m.

DEPT: Courtroom of the Honorable William A. Ingram, 175 West Taylor Street, San Jose, CA

1. I am Senior Field Representative for Service Employees International Union Local No. 715. This Union is the recognized employee organization for most of the employees of the County of Santa Clara. We represent the employees of the Transportation Agency.

2. Local No. 715 is party to a Memorandum of Understanding with the company which incorporates the Affirmative Action Plan as follows:

"The County and the Union agree to cooperate to achieve equitable representation of women, minorities, and disabled at all occupational levels designated by Federal, State and County Affirmative Action goals and timetables as adopted by the Board of Supervisors."

3. We Have been aware of the Johnson suit against the County and its possible affects upon Diane Joyce. During the early part of the proceedings, I spoke with Ann Ravel, Deputy County Counsel, in order to determine whether the Union should take any action to intervene. Ms. Ravel informed me during that conversation, which occurred in 1981, that there was nothing to worry about and that the suit would never go to court.

4. Based upon the above information, Local No. 715 took no action to intervene in these proceedings to protect Diane Joyce. In addition to protecting Diane Joyce, the Union has an interest in preserving the Merit System rules as well as the Affirmative Action Program. Local No. 715 supports the County's Affirmative Action Program.

5. Local No. 715 wishes to intervene in these proceedings to protect Diane Joyce's job as well as the County's Affirmative Action Program, the Merit System rules and our Memorandum of Understanding, which incorporates the Affirmative Action Program as well as the Merit System rules.

6. If called as a witness, I could competently testify to the above facts since they are within my personal knowledge.

Executed this 18 day of September, 1982, at San Jose, California.

/s/ Kristina M. Sermersheim

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

NO. C-81-1218 WAI (SJ)

PAUL E. JOHNSON,

Plaintiff

vs.

TRANSPORTATION AGENCY, SANTA CLARA COUNTY, CALIFORNIA,

Defendant.

STIPULATION AND ORDER
(Received Dec. 23, 1982)

IT IS HEREBY STIPULATED by and between the plaintiff, PAUL JOHNSON through his attorney JAMES L. DAWSON, and defendant, TRANSPORTATION AGENCY, SANTA CLARA COUNTY, CALIFORNIA, through its attorney, Office of the County Counsel, STEVEN WOODSIDE, that:

1) Defendant shall pay forthwith to plaintiff's attorney the sum of $15,938.29. This sum represents plaintiff's allowable costs in the sum of $2,168.29 and attorney's fees up to and including December 13, 1982, in the sum of $13,770.00 representing 162 hours of work at the rate of $85.00 per hour;

2) Defendant shall pay the sum of $ [(to be determined)] forthwith to plaintiff PAUL JOHNSON. This sum represents plaintiff's compensation pursuant to paragraph 3 of the judgment herein, adjusted up to and including December 19, 1982;

3) Defendant shall hereinafter pay to plaintiff the rate of compensation of that of the position of Road Dispatcher;

4) Defendant shall, if it so desires, file an appeal in this cause on or before Monday, December 27, 1982;

5) In the event that defendant files an appeal, defendant may move to stay execution of paragraph 2 of the judgment. Such a motion for stay of execution of paragraph 2 of the judgment shall be made as early as practicable.

GRUBER, DAWSON & PREEFER

By /s/ James L. Dawson
Attorney for Plaintiff.

DATED: December 23, 1982

OFFICE OF THE COUNTY COUNSEL

By /s/ Steven Woodside
Attorney for Defendant.

DATED: December 23, 1982

IT IS SO ORDERED:

/s/ William A. Ingram
UNITED STATES DISTRICT JUDGE

DATED: 12/27/82

(6)

No. 85-1129

Supreme Court, U.S.
FILED
AUG 21 1986
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1985

PAUL E. JOHNSON,

Petitioner,

v.

TRANSPORTATION AGENCY,
SANTA CLARA COUNTY CALIFORNIA, and
SERVICE EMPLOYEES INTERNATIONAL UNION
LOCAL 715,

Respondents.

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

PETITIONER'S BRIEF

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51pp

QUESTION PRESENTED

May a public employer lawfully promote a less-qualified female candidate over a more-qualified male employee allegedly pursuant to an affirmative action plan adopted solely to eliminate a statistical disparity in the work force, unrelated to sex discrimination?

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42 U.S.C. § 2000e-2(a) (1983) 1, 2, 23

MISCELLANEOUS

Subcommittee on Labor of the Committee on Labor and Public Welfare of the United States Senate, *Legislative History of the Equal Employment Opportunity Act of 1972, (H.R. 1746, P.L. 92-261) Amending Title VII of the Civil Rights of 1964* (November 1972) 20, 34, 36

United States Commission on Civil Rights, Affirmative Action in the 1980's: Dismantling the Process of Discrimination (1981) 27

OPINIONS BELOW

The opinion of which review is sought is *Johnson v. Transportation Agency, Santa Clara County, California*, 748 F.2d 1308 (9th Cir. 1984), *modified and reh'g denied*, 770 F.2d 752 (9th Cir. 1985) (Pet. App. 17a-52a). The District Court's judgment, findings of fact, and conclusions of law are unpublished. (Pet. App. 1a-16a).

JURISDICTION

The Ninth Circuit entered judgment against Petitioner on December 4, 1984. A Petition for Rehearing was denied on September 5, 1985. On November 25, 1985, the Honorable William H. Rehnquist extended the time for filing the Petition for Writ of Certiorari to and including January 3, 1986. The Petition was filed on December 31, 1985, and this Court granted Certiorari on July 7, 1986. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) (1976).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This action is based on Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (1982). The applicable provision states in part:

§ 2000e-2. Discrimination because of race, color, religion, sex, or national origin

(a) Employers. It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; . . .

42 U.S.C. § 2000e-2(a)(1) (1983).

STATEMENT OF FACTS

A. Facts and Background

On March 20, 1981, the Petitioner Paul E. Johnson filed suit against his employer, the Respondent Santa Clara County Transportation Agency (hereinafter the "Agency"). Petitioner complained that the Agency discriminated against him on account of his sex in denying him a promotion to the position of Road Dispatcher, instead giving the position to a woman even though Petitioner was selected as the best qualified candidate for the promotion. J.A. 5.

In December, 1979, Petitioner, then a Road Maintenance Worker II for the Agency, applied for the promotion to Road Dispatcher. A Road Dispatcher assigns crews, equipment, and materials to road maintenance jobs and maintains the records relating to each of these areas. The job requires a working knowledge of personnel, equipment, materials, and the various roads maintained by the County. J.A. 23. The position is part of the classified

service of the Agency's work force and is under the County's Merit System Rules. RT, Vol. I, 16:15-18.[1]

Petitioner applied for the position of Road Dispatcher in 1974 and placed second on the eligibility list, after Ronald Neals who was promoted. When he failed to be promoted, Petitioner requested and received a voluntary demotion from Road Yard Clerk II to Road Maintenance Worker, to increase his opportunities to gain experience for future promotion within the Agency.[2] RT, Vol. I, 127:13-20, 128:20-25, 129:1-11. The next vacancy occurred in 1979, when Neals was promoted. Petitioner had the qualifications and experience required for the position. Further, he worked out of class[3] full-time, from September of 1979 until June of 1980, as a Road Dispatcher in the position for which the vacancy existed. RT, Vol. I, 130:2-13.

Eight other Agency employees, including Diane Joyce, also a Road Maintenance Worker II, applied for the position.[4] Joyce too had applied for the position of

---

[1]The Reporter's Transcript is cited herein as RT, followed by the volume number, page and line(s).

[2]Petitioner started working for the Agency in 1967, after seventeen years with Pacific Cement and Aggregate Co., where he held the position of dispatcher for the first seven years, and dispatcher and supervisor thereafter. RT, Vol. I, 126:3-11. He went to work for the Agency rather than accept a promotion that would have entailed a move to Oakland, California. RT, Vol. I, 126:12-15.

[3]The term "work out of class" means that an employee is assigned to a position and is paid at a higher rate of compensation for the work performed. RT, Vol. I, 113:13:18.

[4]Joyce had worked as a Road Dispatcher for two weeks filling in at the East Yard. RT, Vol. I, 94:4-6. Like Petitioner, RT, Vol. I, 127:6-9, she "sat within proximity of the Road Dispatcher for many years." RT, Vol. I, 94:9-12. Joyce also filled in for a half an hour during lunch hours. RT, Vol. I, 103:11-14.

Road Dispatcher in 1974, but did not go through the selection process because she did not have the required experience or qualifications. RT, Vol. I, 96:12-24. By 1979, Joyce had gained the experience necessary to apply.

The County Personnel Department held the first oral interviews in April, 1980. Only seven of the nine candidates interviewed received the required score of seventy or above on the oral examination. J.A. 15. After the interview, William Kinnear was ranked first, with a score of 80, followed by Petitioner and Walter Mitchell who tied with a score of 75. The remaining candidates were ranked as follows: Joyce with a score of 72.5 rounded up to 73,[5] Richard Jadrich (71), Ronald McNay (71), and Albert Silva (70). J.A. 26. These seven individuals were placed on the civil service eligible list, J.A. 15, 26, and participated in a second oral interview. J.A. 16.

The second oral examination was conducted by three Agency Supervisors: Clyde Davis, Glen Foreman, and James Baldanzi. RT, Vol. II, 150:11-13, 162:10-13, 163: 24-25, 164:1-2.[6] All applicants were asked the same ques-

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[5]J.A. 16.

[6]The questions were:

1. Why do you want to be a Road Dispatcher?

2. What do you perceive a Dispatcher's job to be?

3. As you know the Dispatcher's job involves work indoors. How will you adjust to indoor work?

(Handwritten 4) What experience do you have that you feel qualifies you for this position?

(Typewritten 4) A citizen calls in says there is a tree down. What other information would you need to handle this complaint successfully?

(Continued on next page)

tions, and the candidates were evaluated after all of the interviews were completed. RT, Vol. II, 164:13-25, 164: 1-3, 165:1-3, 166:6-11. Under this process, all candidates were treated equally. RT, Vol. II, 164:13-25, 165:1-3.

Following the second interview, Petitioner was ranked first and unanimously recommended as the best qualified for the promotion. RT, Vol. II, 165:23-25, 166:1-22.[7] Jadrich was ranked second and Joyce was ranked third. RT, Vol. I, 93:1-3.

Before the second interviews were completed, Joyce contacted the County's Women's Coordinator, Helena Lee, because she, Joyce, had heard rumors that Petitioner had the promotion sewn up, and because she believed that the process would be unfair to her due to past incidents with Baldanzi and Foreman. J.A. 16; RT, Vol. I, 89:3-11, 91:17-25, 92:1-6, 101:15-24. Lee contacted Victor Morton, the Agency's Affirmative Action Coordinator, about Joyce's application. J.A. 16. Morton, in turn, contacted James Graebner, the Director of the Transportation Agency, and recommended that Joyce be promoted because she was the only applicant within a "protected class" as defined by the Agency's affirmative action plan. Pet. App. 19a.

(Continued from previous page)

5. How would you handle a call from an irate citizen?

6. A citizen living in the City of San Jose's jurisdiction calls with a complaint about a street that is within the City. He has called the City, and they say it is a County problem. How would you handle the problem?

RT, Vol. II, 157:2-3, 5-23.

[7]Kinnear and Mitchell, who ranked first and second respectively after the first interview, were ranked after Joyce following the second interview.

The Agency's affirmative action plan,[8] effective December 18, 1978, was adopted "to attain an agency work force whose composition reflects the ethnic and sexual make-up of the area work force." J.A. 34. The plan identified certain "protected groups" and then compared the statistical representation of these groups in the area work force to the agency as a whole[9] and in the EEOC job categories,[10] and established that the Agency will work toward achieving balance.

For women, the goal was 36.4% female representation not only in the Agency work force as a whole, but in all EEOC job categories and in each of the County's 118 job classifications so that female representation approximated the distribution of women in the Santa Clara County work

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[8]The Agency affirmative action plan incorporates and implements the Santa Clara County Equal Opportunity Policy, which is the County's affirmative action plan. J.A. 33.

[9]The Agency plan shows that the "goal" is to achieve a balance of 63.6% male representation and 36.4% female representation. In addition, the plan sets the racial goals as 79.2% White, 1.6% Black, 14.8% Hispanic, 2.3% Asian, 0.4% American Indian and 0.6% Filipino. These same "goals" are repeated in the 1979 County plan, J.A. 121, and in the 1982 plan introduced after trial. Supplemental Excerpt of Record 191. Although minority representation exceeded the goals set for the Agency as a whole, minorities were still considered protected groups until the Agency achieved the identified percentage of representation in each of the job categories. J.A. 52-53.

[10]EEOC job categories include Officials and Administrators, Professionals, Technicians, Para-Professionals, Office and Clerical, Skilled Craft Workers and, Service and Maintenance. J.A. 48.

force. J.A. 54.[11] In addition, "[t]he goals established for females and individual ethnic minority groups include attainment of equitable representation of minority women within each group." J.A. 55. Before Joyce was promoted, there were no women among the 238 employees classified in the Skilled Craft category. J.A. 52.

No Agency act, practice, or process was identified in the plan as causing the disparity in percentage of women in the Agency's work force compared to the percentage of women in the area work force. Graebner, the Director of the Agency, testified that he was not aware of any past or present practices or policies which discriminated against women. RT, Vol. I, 39:10-16.

The plan stated that the statistical disparity between the percentage of women employed by the Agency and women employed in the County required aggressive, affirmative action in all phases of employment until balance is achieved. J.A. 54. The plan instructed that it is not sufficient to merely prohibit discrimination and that affirmative steps must be taken so that the work force is in balance. J.A. 31. The plan did note that external factors have hindered achievement of the goal of 36.4% female representation. J.A. 55-57.[12]

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[11]"Of the 1,252 employees, 281 or 22.4% were women, significantly falling short of the 36.4% ratio of women in the area work force (1970 census)." J.A. 45. The actual representation of women, 22.4% was a significant improvement over the 1973 figure of 8.5% when the County Department of Public Works was reorganized into the Transportation Agency. J.A. 45

[12]Janet Thomas, the Agency Personnel Officer, testified that she believed that the goal was not realistic because of a lack of interest by women. RT, Vol. II, 263:6-20, 272:12-20.

Pursuant to the affirmative action plan, the promotion was awarded to Joyce in June of 1980. Petitioner learned that he would have received the promotion but for the intervention of the Affirmative Action Director, who wanted to promote Joyce so that the numbers would show that a woman was employed in the Skilled Craft category. RT, Vol. II, 281:24-25, 282:1-4.[13] Petitioner filed a complaint with the Equal Employment Opportunity Commission, alleging that the Agency discriminated against him on the basis of sex. J.A. 9. He received a right to sue letter on March 10, 1981 and filed suit in the United States District Court for the Northern District of California on March 20, 1981. J.A. 5.

B. Decisions Below

1. Decision of the District Court

The District Court found as a matter of fact[14] that Petitioner was the best qualified candidate and that "[b]ut for plaintiff's sex, male, he would have been promoted to the position of Road Dispatcher." Pet. App. 13a. "But for Diane Joyce's sex, female, she would not have been appointed to the position of Road Dispatcher." Pet. App. 13a. In addition, the District Court determined that "[t]he Transportation Agency has not discriminated in

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[13]Humbert Anthony Di Basilio testified that he could only remember one other instance in his twenty-six years with the Agency that a promotion recommendation was not followed. RT, Vol. II, 189:22-25. Graebner testified that he had never before stepped in and made a final decision as to a promotion within the Road Operations Division. RT, Vol. I, 15:24-25, 16:1-2.

[14]A bench trial was held on May 7 and 12, 1982.

the past, and does not discriminate in the present against women in regard to employment opportunities in general and promotions in particular." *Id.* [15]

The District Court found as a matter of fact that the rationale for Joyce's appointment was the Agency's affirmative action plan. However, "[t]he Affirmative Action Plan had no end date or other provision which would have the effect of ending preferential treatment to women." Pet. App. 13a. Nor did the 1979 County affirmative action plan limit the Agency plan.

> There is nothing within the County Plan, Ex.2, which is consistent with any temporary remedial purposes. Rather, it contains 82 full pages of instructions pertaining to the annual, ongoing and apparently perpetual maintenance of an Affirmative Action Plan.
>
> In like manner, the provisions of the Agency Plan, Ex. 1, reveal no discrete time period or ultimate goal to be accomplished within a reasonable time from which the Court can infer that the plan is temporary and remedial, as distinguished from ongoing and designed to maintain balanced employment of persons in categories designed to be protected under the plan.

Pet. App. 8a. The District Court determined that "[t]he defendant's refusal to promote plaintiff to the position of Road Dispatcher was in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* as amended."

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[15]The District Court found that the Agency's interview procedures were fair and reasonable. Pet. App. 13a. This has not been disputed.

Pet. App. 14a.[16] The District Court ordered that Petitioner be promoted to the position of Road Dispatcher, and receive all forms of compensation and benefits as a result of the discriminatory failure to appoint him to the position.[17]

The Agency filed a motion for reconsideration before the District Court, arguing that the District Court had

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[16]As stated by the District Court:

> 5. The Affirmative Action Plans of the County Transportation Agency and the County of Santa Clara did not justify the failure to promote plaintiff to the position of Road Dispatcher. The defendant has failed to demonstrate that either or both of the plans are a temporary measure intended to eliminate a manifest imbalance in the work force in the Transportation Agency, but instead, were and are interpreted in such a fashion so as to attempt to maintain an ongoing balance.
>
> 6. The defendant has failed to demonstrate that the Affirmative Action Plan of the Transportation Agency will end or be modified in any way at any point in time or when the defendant's work force composition as a whole, by department, by EEOC category or defendant's major job classification reaches a certain number of percentage of women.

Pet. App. 14a.

[17]Petitioner was appointed to the position of Road Dispatcher on May 22, 1983, after he sought an enforcement order from the District Court. Order of 5-5-83, District Court Docket Entry 71. He took an early retirement from the Agency after Rehearing was denied by the Ninth Circuit. He has received a back pay award of $6,799.28, to and including December 19, 1982, but has not received the differential in pay he would have earned from December 20, 1982 to May 21, 1983. Further, no pension contributions were made from the back pay award or for the period from December 19, 1982 until the Agency actually appointed him to the position on May 22, 1983.

made several errors of fact.[18] In particular, the Agency argued that the enactment of a new plan, effective in 1982 and submitted after trial, was evidence that the plan was not permanent but instead set yearly goals based on annual revisions. The agency also argued that the 1974 promotional announcement, phrased in gender terms, was evidence of past discrimination.

2. Decision of the Ninth Circuit

On appeal to the Ninth Circuit, the Agency argued that the statistics contained in the plan, buttressed by the testimony of Joyce as to the 1974 promotional announcement and the testimony that Baldanzi, a Roads Supervisor, viewed Joyce as a "skirt-wearing, rebel-rouser" who was not a lady, constituted evidence of patterns of discrimination against women sufficient to justify the adoption of the Agency's plan.[19] The Agency also argued that the plan in effect at the time of trial "was a 1-year plan effective January 1, 1982" that contained yearly employment goals rather than quotas, which

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[18]The Service Employees International Union, Local 715 (SEIU) sought intervention as a defendant after trial in order to protect Joyce's job. J.A. 145. The District Court granted SEIU's motion for the limited purpose of arguing the motion for new trial and appeal, if taken by the Transportation Agency. See Order of 10-25-83, District Court Docket Entry 58.

[19]The District Court found that Baldanzi's attitude was not adequate proof of historical justification to adopt the plan. Pet. App. 9a.

showed that the District Court erred in finding that the plan was "permanent and intended to maintain balance." Ninth Circuit Docket, June 20, 1983.

Judges Fletcher and Ferguson voted to reverse the District Court, holding that "the District Court misapprehended the requirements for a bona fide affirmative action plan." Pet. App. 18a. The court held that "the District Court adopted an overly restrictive view" of the test set forth in *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979).[20]

The court did not disturb most of the District Court's findings of fact, including the finding that the Agency had not discriminated in the past. However, the Ninth Circuit did reverse the District Court's finding that the program was "permanent and designed to maintain a particular balance," without declaring that the District Court's finding was clearly erroneous. Pet. App. 20a.

Instead, the Ninth Circuit determined that the plan was not intended to be permanent. "[W]hile the Agency plan contains no date certain or other express statement of fixed duration, it also contains no statement that it is in-

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[20]The Court of Appeals questioned whether the District Court had inappropriately placed the burden of persuasion on the employer, citing the Supreme Court's decision in *McDonnell Douglas v. Green*, 411 U.S. 792 (1972). However, the Court did not reach a decision on this issue, holding that the employer had met the higher burden imposed by *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979).

tended to be permanent." Pet. App. 23a. "[T]he entire focus of the plan is on 'attaining,' rather than maintaining, balance." *Id.* Thus, "[u]nlike the District Court, we believe that this emphasis upon the 'attainment' of a representative work force does 'have the effect of ending preferential treatment to women' once parity is achieved." Pet. App. 24a. The Court concluded:

> Plans like this one are usually voluntarily adopted by employees [sic] who wish to express and act upon their commitment to social justice. They should not be rigidly interpreted so as to make their validity depend on technicalities in drafting. To do so would only discourage their adoption and encourage litigation. The District Court's assumption that *Weber* requires an expressed date certain for termination or some other express provision that would trigger the end of an affirmative action plan was erroneous. . . . Undoubtedly, a plan must end when its remedial function has been served. The fact that the plan must end, however, does not necessitate the inclusion of an explicit ending provision.

Pet. App. 24-25a.

The Ninth Circuit declared that an employer need not "show its own history of purposeful discrimination. Instead, a plan is sufficiently remedial if it is based upon "a conspicuous imbalance in its work force." Pet. App. 26a. "Statistics are extremely useful in showing a conspicuous work force imbalance. We note particularly the difficulty that may confront an employer whose plan is intended to remedy discrimination resulting from societal norms." Thus, because not one of the skilled craft positions was filled by a woman and "strong social pressures weigh against their participation," the promotion of Joyce aptly served the remedial purpose of the affirmative action plan. *Id.*

Finally, the court determined that the application of the affirmative action plan did not serve as an absolute bar to the advancement of other employees nor did it unnecessarily trammel their interests. Pet. App. 28a.

> While the Agency plan does not establish specific programs for recruitment, hiring, training, or promotion, it does lay a solid foundation for affirmative action. . . . The import of the plan, as with any lawful affirmative action plan, is to give preference to members of underrepresented groups. The plan does not indicate, however, that other employees will be barred or that their interest will be unnecessarily infringed.

Pet. App. 28a. The court rejected the view that the selection of Joyce barred Petitioner from the promotion.

> The instant case differs markedly from *Weber* and *LaRiviere* in that it does not involve the admission of numerous applicants to a training program. Rather, it concerns the selection of one applicant for a single opening. When there is but one opening, the selection of one candidate will necessarily result in exclusion of all others. Unless we are shown a distinct pattern of exclusion of non-minority candidates from such positions, we cannot conclude that a single employment decision serves as a bar or unnecessarily trammels the interests of other employees.

Pet. App. 28-29a. Accordingly, the Court of Appeals held that the plan "was necessary and lawful, within the guidelines of *Weber*, to remedy longstanding imbalances in the work force." Pet. App. 29a.

Judge Wallace concurred in the reversal of the District Court's decision, but dissented from the majority's reasoning. He concluded that the case should have been vacated

and remanded because the District Court failed to allocate properly the evidentiary burdens between the parties and to make sufficiently detailed findings of fact.

Petitioner filed for Rehearing and Suggested that Rehearing be *en banc,* because the court had ignored the District Court's finding that the Agency did not discriminate against women in the past nor does it discriminate at present, and thus the plan was not *bona fide.* Second, Johnson argued that the Ninth Circuit applied a *de novo* standard of review to the District Court's finding of fact that the plan was permanent.

The Ninth Circuit denied the Petition for Rehearing on September 5, 1985. In amendments to their earlier opinion, Judges Fletcher and Ferguson stated that "the District Court's factual finding of no past or present discrimination against women by this employer is irrelevant to the issue of the validity of the affirmative action plan." Pet. App. 49a. Further, the court noted that "were Ms. Joyce the plaintiff here, the job having gone to Mr. Johnson, the statistics would make a prima facie case of discrimination." Pet. App. 50a.

In his amended opinion, Judge Wallace stated that the majority's decision conflicted with the Seventh Circuit's decision in *Janowiak v. Corporate City of South Bend,* 750 F.2d 557 (7th Cir. 1984), as well as the Supreme Court's decision in *United Steelworkers of America v. Weber,* 443 U.S. 193 (1979), which hold "that a showing of past discrimination must be made." Pet. App. 52a. Further, to the "extent that the majority opinion holds

that a mere statistical disparity suffices to show that a job category was 'traditionally segregated,' it is contrary to both *Weber* and *Janowiak*." Pet. App. 52a.

SUMMARY OF ARGUMENT

1. A voluntary affirmative action plan by a public employer must be reviewed under the Fourteenth Amendment's strict scrutiny standard even though Petitioner only claims violation under Title VII. The use of strict scrutiny as applied by this Court in *Wygant v. Jackson Board of Education*, 54 U.S.L.W. 4479 (U.S. May 19, 1986), (holding that voluntary affirmative action plan by a public employer that affords race conscious remedies is to be reviewed under strict scrutiny), would avoid the anomalous result of invalidating a race based voluntary affirmative action plan but possibly upholding that same plan as it applies to sex-based classifications. Even though this case concerns a sex-based classification, it should be subject to strict scrutiny because neither Title VII nor the Fourteenth Amendment countenance discrimination and any exception to that principle established by this Court should be very narrow.

2. From the outset, the Agency's plan lacked any remedial purpose that justified denying Petitioner his promotion on account of his sex. Affirmative action programs adopted solely to remedy societal discrimination are impermissible. *Wygant v. Jackson Board of Education*, at 4482. The District Court, in rejecting statistical disparity as the sole justification for the plan, expressly found that the Agency had never engaged in discrimination

and does not now engage in discrimination, Pet. App. 13a, and the Court of Appeals never disturbed that finding of fact. Pet. App. 49a.

3. Even if this plan met the compelling state interest criteria by having a legitimate remedial purpose, it is also invalid because it was not narrowly tailored in any material respect to avoid unnecessarily trammeling Petitioner's individual rights. The plan allocated an across the board employment preference to members of the protected classes (women, minorities, and the handicapped) for each job in the Agency. The application of the preference to promotions, when coupled with the low turnover and lack of any new positions in the Roads Division of the Agency, meant that affirmative action would always bar Petitioner from advancement, when competing with an employee who is a member of a protected class. Petitioner had worked for the Agency for 13 years and had worked toward this promotion for 5 years. He was indisputably the best qualified and lost the promotion solely because the competing employee was a woman and the Agency Director wanted to meet his numerical affirmative action goals.

4. While Petitioner does not believe that the case of *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), applies to this case, because that case was limited to a private employer, the Agency's plan did not even meet the guidelines set forth in *Weber*. The plan lacked any remedial purpose other than to correct societal attitudes. The unrealistic nature of the employment goal for women, coupled with the low turnover and lack of new positions, meant that Petitioner would always be barred from promotion when competing with an employee who was protected under the affirmative action plan. It clearly tram-

meled Petitioner's individual rights by denying him the promotion and operating to deny him future advancement. It also lacked any end date and was intended to maintain the ethnic and sexual make up of the area's work force.

5. Just as *Weber* does not apply because the Agency is a public employer, the rules governing the allocation of burdens of proof and persuasion set forth in *McDonnell Douglas v. Green,* 411 U.S. 792 (1973) also should not apply to this case. *McDonnell Douglas* addressed the problems of proof when there was no direct evidence of intent to discriminate and the employer asserted that it had a nondiscriminatory reason for not hiring the plaintiff. Here, the Agency admitted that Petitioner was not promoted because he was a man and advanced the affirmative action plan as its defense. When an affirmative action plan is used as an affirmative defense, the employer should bear the burden of proof as to its validity. In this case, it makes no difference how the burdens of proof are allocated because the record establishes that Petitioner proved that he was the victim of discrimination on account of his sex and that the affirmative action plan is invalid under the *Weber* guidelines or under the Fourteenth Amendment's standard of review, as argued to this Court.

ARGUMENT

An affirmative action plan allows intentional discrimination on account of race, color, religion, sex or national origin, but only if the affirmative action plan serves a legitimate remedial purpose and it is narrowly tailored so as not to impose disproportionate burdens on nonminority employees that unnecessarily trammel their individual rights.

The Respondent's affirmative action plan, which cost Petitioner his promotion, had no legitimate remedial purpose. The statistical disparity between the percentage of women employed by the Agency and the percentage of women in the area wide work force, standing alone, and without evidence or a claim of past or present discrimination, did not justify the adoption of this discriminatory plan. Without any evidence of past or present discrimination the affirmative action plan had no lawful remedial purpose, was not "bona fide," and cannot excuse the Agency's intentional act of discrimination against Petitioner.

Further, even if some remedial action were justified, it must be narrowly tailored, taking into account the less restrictive alternatives. The plan was not limited to less restrictive alternatives and promoting Joyce imposed disproportionate harm on Petitioner and violated his individual right not to suffer sex-based discrimination. For these reasons, and as argued more fully below, Petitioner asks this Court to reverse the decision of the Court of Appeals.

I. UNDER TITLE VII A VOLUNTARY AFFIRMATIVE ACTION PLAN BY A PUBLIC EMPLOYER MUST ALSO COMPLY WITH THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

Although Petitioner only seeks relief under Title VII, the Agency is a public employer and its voluntary affirmative action plan must be analyzed under the Fourteenth Amendment, rather than the guidelines of *United Steelworkers of America v. Weber,* 443 U.S. at 200, which apply only to private employers. This is consistent with the

legislative history of Title VII's extension to state employers by operation of § 5 of the Fourteenth Amendment.[21] *See also Regents of the University of California v. Bakke,* 438 U.S. 265, 287 (1978) (holding that Title VI proscribed racial classifications that also violated the Equal Protection Clause of the Fourteenth Amendment or the Fifth Amendment); *Local No. 93 v. City of Cleveland,* 54 U.S.L.W. 5005, 5013 (U.S. June 24, 1986) (O'Connor, J., concurring) (race conscious relief in a consent decree by a public employer must be consistent with Fourteenth Amendment).

This Court has not decided what constraints might apply to a public employer's voluntary affirmative action plan under Title VII.[22] However,

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[21]The expansion of Title VII coverage to State and local government employment is firmly embodied in the principles of the Constitution of the United States. The Constitution has recognized that it is inimical to the democratic form of government to allow the existence of discrimination in those bureaucratic systems which most directly affect the daily interactions of this Nation's citizens. The clear intention of the Constitution, embodied in the Thirteenth and Fourteenth Amendments, is to prohibit all forms of discrimination.

Subcommittee on Labor of the Committee on Labor and Public Welfare of the United States Senate, *Legislative History of the Equal Employment Opportunity Act of 1972, (H.R. 1746, P.L. 92-261) Amending Title VII of the Civil Rights of 1964* 79 (November 1972) (hereinafter *Legislative History*).

[22]This issue was specifically reserved in *United Steelworkers of America v. Weber,* 443 U.S. 193, 200 (1979). "We emphasize at the outset the narrowness of our inquiry. Since the Kaiser-USWA plan does not involve state action, this case does not present an alleged violation of the Equal Protection Clause of the Fourteenth Amendment."

> [w]hen a state employer claims that arguably discriminatory conduct on its part is nonetheless authorized by Title VII, the claim of such statutory authorization must be considered in light of the prohibitions of the Fourteenth Amendment. . . . [A]s always the statute must be read with the presumption that Congress did not intend to authorize conduct that is prohibited by the Constitution.

Bushey v. New York State Civil Service Commission, 105 S. Ct. 803, 806 (1985) (Rehnquist, J., dissenting from denial of certiorari) *citing NLRB v. Catholic Bishop of Chicago,* 440 U.S. 490, 500-01 (1979).[23]

In *Wygant v. Jackson Board of Education,* 54 U.S.L.W. 4479, 4482 (U.S. May 19, 1986), a case decided under the Fourteenth Amendment, this Court expressly declined to apply *United Steelworkers of America v. Weber,* 443 U.S. 193 (1979) in considering the validity of a public employer's voluntary affirmative action plan that used race conscious remedies.[24] Instead, the Court applied the strict

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[23]The only court to address the issue applied a "heightened scrutiny" to invalidate a public employer voluntary affirmative action plan before this Court's decision in *Wygant. Janowiak v. Corporate City of South Bend,* 750 F.2d 557 (7th Cir. 1984), *petition for writ of cert. filed,* 53 U.S.L.W. 3896 (U.S. June 10, 1985) (No. 84-1936) *citing Regents of the University of California v. Bakke,* 438 U.S. 265, 359 (1978) (Brennan, J. dissenting). Other courts have extended *Weber* to public employers, without considering affirmative action's validity under the Fourteenth Amendment. *La Riviere v. EEOC,* 682 F.2d 1275, 1279 (9th Cir. 1982).

[24]"Similarly, the Court approved the hiring program in *Steelworkers v. Weber,* 443 U.S. 193 (1979), in part because the plan did not 'unnecessarily trammel the interests of the white employees.' Since *Weber* involved a private company, its reasoning concerning the validity of the hiring plan at issue there is not directly relevant to this case, which involves a state-imposed plan. No equal protection claim was presented in *Weber.*" *Wygant v. Jackson Board of Education,* 54 U.S.L.W. 4479, 4483, n.9 (May 19, 1986).

scrutiny standard, considering whether the affirmative action plan, stated "a compelling government interest" and whether "the means chosen were 'narrowly tailored to the achievement of that goal.' "

This Court should also apply the strict scrutiny standard used in *Wygant* to review the Agency's voluntary affirmative action, because both Title VII and the Fourteenth Amendment forbid discrimination, except for narrowly construed exceptions based on past discrimination.[25] While agreeing with the use of strict scrutiny in *Wygant*, Justice O'Connor in a concurring opinion added that a public employer's voluntary affirmative action program must be based on a legitimate remedial purpose and be narrowly tailored to that purpose, so as not to impose disproportionate burdens on other employees. *Wygant v. Jackson Board of Education*, 54 U.S.L.W. at 4486 (O'Connor, J., concurring.)

Strict scrutiny is also mandated for a public employer's affirmative action plan, because classifications based on race and sex are equally unlawful under Title VII.[26]

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[25]This Court's decisions in *McDonald v. Santa Fe Transp. Co.*, 427 U.S. 273 (1976) (holding random discrimination violative of Title VII) and in *Weber*, 443 U.S. at 200 (holding planned discrimination did not violate Title VII) can only be reconciled if any exception to Title VII's flat prohibition against discrimination is narrowly construed.

[26]Even assuming for purposes of argument that *Weber* applies to sex based affirmative action programs, it should be noted that the 1964 Civil Rights Act legislative history relied upon in *Weber*, provides for a more compelling basis for affirmative action on the basis of race than does the 1972 legislative history's discussion of the economic impacts of sex discrimination. Moreover, there is a strong tradition upholding race conscious remedies to eliminate the vestiges of past discrimination. *See Swann v. Charlotte-Mecklenburg Bd. of Education*, 402 U.S. 1 (1971) (school desegregation); *United Jewish Org. v. Carey*, 430 U.S. 144 (1977) (voter distribution).

42 U.S.C. § 2000e-2(a) (1983); *City of Los Angeles v. Manhart,* 435 U.S. 702 (1978). In *Wygant,* this Court held that race based classifications in a voluntary affirmative action program are subject to strict scrutiny under the Fourteenth Amendment. Congress did not constitutionally lower that standard of review under Title VII as it applies to racial discrimination by a public employer. Therefore, the strict scrutiny standard must also be applied under Title VII to sex-based discrimination by a public employer under a voluntary affirmative action.

To apply a less strict standard of review to public employer affirmative action plans would lead to an anomalous result. An affirmative action plan might be valid as to sex-based classifications under the Fourteenth Amendment but invalid as to its racial classification, under the strict scrutiny standard applied in *Wygant,* even though the social basis for race-based affirmative action is much stronger than for sex-based affirmative action. This anomaly would also occur if this Court were to apply only "heightened scrutiny" used in Fourteenth Amendment sex discrimination cases in reviewing this plan. *Mississippi University for Women v. Hogan,* 458 U.S. 718, 724 (1982). Such anamolies can be avoided by applying strict scrutiny to all public employer affirmative action plans. This would also promote the underlying policies in Title VII and the Fourteenth Amendment, of prohibiting discrimination on the basis of race, color, religion, sex, or national origin by ensuring that any exceptions are very narrow.

II. AN AFFIRMATIVE ACTION PROGRAM SERVES NO LEGITIMATE REMEDIAL PURPOSE WHEN IT IS BASED SOLELY ON A NAKED STATISTICAL DISPARITY.

The District Court found as fact that "[t]he Transportation Agency has not discriminated in the past, and does not discriminate in the present against women in regard to employment opportunities in general and promotions in particular." Pet. App. 13a. The District Court also held that the plan's stated remedial purpose was insufficient.

> There is nothing in the County Plan, Exhibit 2, which is consistent with any temporary remedial purposes. * * * There is nothing on the face of Exs. 1 or 2 which tends to show that the adoption of the Affirmative Action Plan therein contained was prompted by concededly discriminatory practices committed in the past by the County or the Agency as distinguished from generally prevalent societal attitudes.

Pet. App. 8a-9a.

Judges Fletcher and Ferguson of the Court of Appeals did not set aside those findings as clearly erroneous. Nor could they have. Instead, the Court of Appeals held that the Agency's affirmative action plan had a valid remedial purpose based solely on general statistics showing that women were underrepresented in the Agency's work force. As stated by the Ninth Circuit, "[i]t is sufficient for the employer to show a conspicuous imbalance in its work force. * * * We note particularly the difficulty that may confront an employer whose plan is intended to remedy discrimination resulting from societal norms. * * * A plethora of proof is hardly necessary to show that women are generally underrepresented in such positions and that strong

social pressures weigh against their participation. . . ." Pet. App. 26a-27a. The majority noted that the District Court's finding of no discrimination, past or present, was "irrelevant to the issue of the validity of the affirmative action program." Pet. App. 49a.

Judge Wallace disagreed in his concurring and dissenting opinion, stating:

> A judicial inquiry demands no official administrative or judicial determination of discrimination. . . . Nevertheless, the employer must be able to point to past or present discriminatory patterns or practices that created the traditional segregation of the job categories in question. Merely "arguable" violations are not enough. . . . Past discrimination implies some discriminatory cause for the present underrepresentation in the employer's job category and allows the court to go beyond the effects of socially created, accidental differences.

Pet. App. 42a-43a. (Citations omitted.)

A. Affirmative Action Can Only Be Justified Under Title VII to Remedy Actual Past Discrimination.

The Court of Appeals' conclusion that a mere statistical disparity constitutes a legitimate remedial purpose and that a showing of past discrimination is unnecessary is fatally flawed. Affirmative action programs adopted solely to remedy societal discrimination are impermissible. *Wygant v. Jackson Board of Education,* 54 U.S.L.W. at 4482. As Justice Powell explained in *Regents of the University of California v. Bakke,* 438 U.S. at 310, "To hold otherwise would be to convert a remedy heretofore reserved for violations of legal rights into a privilege that all institutions throughout the Nation could grant at

their pleasure to whatever groups are perceived as victims of social discrimination. This is a step we have never approved."

In the absence of a legitimate remedial purpose, there is no compelling government interest that would justify the use of affirmative action. In *Wygant,* this Court repudiated a voluntary affirmative action plan adopted by a public employer that was intended to address solely societal discrimination, stating:[27]

> [s]ocietal discrimination without more is too amorphous a basis for imposing a racially classified remedy. . . . There are numerous explanations for a disparity between the percentage of minority students and the percentage of minority faculty, many of them completely unrelated to discrimination of any kind. . . . No one doubts that there has been serious racial discrimination in this country. But as the basis for imposing discriminatory *legal* remedies that work against innocent people, societal discrimination is insufficient and over expansive. In the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future.

Id. at 4482 (emphasis in original).

The obligations of a public employer to eliminate discrimination and yet do away with distinctions based on race (or sex) may not always be harmonious. However,

> a public employer like the Board must ensure that, before it embarks on an affirmative action program, it

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[27]While *Wygant* concerned a racial classification under the Fourteenth Amendment, subject to strict scrutiny, the constitutional prohibition against race conscious schemes to remedy societal discrimination applies with equal force to a public employer's voluntary affirmative action under Title VII.

> has convincing evidence that remedial action is warranted. That is it must have sufficient evidence to justify the conclusion that there has been prior discrimination.

Id.[28]

An employer cannot rely on statistics alone and thereby avoid critical evaluation and analysis. *See United States Commission on Civil Rights, Affirmative Action in the 1980's: Dismantling the Process of Discrimination* 41 (1981). Instead, an employer needs a compelling reason to violate the general prohibition against discrimination in employment.

The fatal flaw in the Court of Appeals' analysis is that it lost sight of the purpose of Title VII. Congress did not grant any power in Title VII to the states to pursue invidious methods of discrimination to achieve arguably socially beneficial goals. Title VII is an anti-discrimination statute.

There is no evidence that Congress intended to preclude state and local government from eliminating discrimination through constitutionally valid means, which could include racial considerations. But, under the Ninth Circuit's reasoning, Title VII becomes a grant of power to states to engage in blatant discrimination that would have been clearly unconstitutional before 1964 and 1972. There is no support in the legislative history to support such a construction of the Act.

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[28]Justice O'Connor concurred in this portion of the plurality opinion, noting only that contemporaneous findings of past discrimination were not required to support an affirmative action program. *Wygant* at 4486-4487.

Other courts have rejected affirmative action programs based solely upon a statistical disparity. In *Valentine v. Smith*, 654 F.2d 503, 508 (8th Cir. 1981), the court wrote, "[a]bsent findings of past discrimination, courts cannot ascertain that the purpose of the affirmative action program is legitimate. Such findings enable courts to ensure that new forms of invidious discrimination are not approved in the guise of affirmative action." At least one court has held that a voluntary affirmative action plan adopted by a public employer based on mere statistical disparity was invalid.

> [E]vidence of statistical disparity alone fails to prove past discrimination and cannot justify the adoption of a remedial plan that may discriminate against nonminorities. Even the four dissenters in *Bakke* seem to agree that the government needs to proffer something more than statistical evidence of a disparity between the percentage of minorities employed and the percentage of minorities in the population to prove past discrimination[.]

Janowiak v. Corporate City of South Bend, 750 F.2d 557, 564 (7th Cir. 1984), *citing Bakke* at 369 (Brennan, J., dissenting).

B. The Agency's Affirmative Action Plan Was Not Adopted to Remedy Any Past Discrimination and Is Therefore Invalid.

Notwithstanding the requirement that any affirmative action plan be intended to address actual discrimination, the Agency adopted its affirmative action program based solely on a statistical disparity. The testimony of the Agency Director and the Personnel Officer and the two affirmative action plans establish that the statistical

disparity in the number of women employed by the Agency in Skilled Craft and Service and Maintenance job classifications was the result of factors beyond the control of the Agency, and not due to any past pattern or practice of discrimination. County Personnel Officer Thomas testified that the statistical underrepresentation was due in part to the fact that women had never trained for and were not interested in such work.[29] For this reason, she believed that the underrepresentation of women was not due to any Agency misdeeds, RT, Vol. II, 277:5-6, and that the goals of statistical parity were "unrealistic."

> Q: (DAWSON) Did you ever comment to anyone in the Transportation Agency that that [36.4% women] was an unrealistic goal?
>
> A: (THOMAS) Yes, for some categories.
>
> Q: (DAWSON) Which categories did you think that was an unrealistic goal for?
>
> A: (THOMAS) I thought it was unrealistic for skilled craft, probably, some of the other service areas, non-traditional kinds of things. Engineers.
>
> Q: (DAWSON) It was unrealistic for non-traditional jobs because in connection with women, because women didn't express an interest in those jobs, or what?
>
> A: (THOMAS) For both women and minorities. Women had not expressed interest in them. Perhaps, just by tradition, had never trained for some of the jobs. Not unusual.

RT, Vol. II, 263:6-20.

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[29]Thomas' testimony about the plan is entitled to substantial weight because the plan places primary responsibility for its implementation on the Personnel Office. J.A. 34.

In the "Work Force Utilization Analysis" the Agency's plan stated:

> Women are also greatly underrepresented in Agency job classifications in other than the bus maintenance field.[30] Generally, most of this underrepresentation exists in job classifications where women have not been traditionally employed in significant numbers.

J.A. 51.

In identifying "Factors Hindering Goal Attainment," the plan stated:

> Many of the Agency positions where women are underrepresented involve heavy labor; *eg.*, Road Maintenance Worker. Consequently, few women seek entry into these positions.
>
> • • •
>
> Many women are not strongly motivated to seek employment in job classifications where they have not been traditionally employed because of the limited opportunities that have existed in the past for them to work in such classifications.

J.A. 56-57.

Certainly the plan and the testimony of the Agency's employees show that the statistical disparity was based on societal attitudes and was not the result, in whole or in part, of any past or present Agency misdeeds. Affirma-

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[30]The plan notes that training prerequisites, such as mechanic training for the bus maintenance position in the Transit Division, may have limited entry to those jobs. No comparable prerequisite applied to the job of Road Dispatcher. J.A. 56, 59.

tive action on these facts lacked any legitimate remedial purpose and is unlawful.

In light of the District Court's express finding that "[t]he Agency did not discriminate in the past, and was not discriminating in the present against women[,]" Pet. App. 13a, it is difficult to find any remedial purpose in the plan. The District Court's analysis of the testimony on the absence of past or present discrimination is controlling. First, the District Court noted that the Agency Director testified that no woman had filed a complaint alleging sex discrimination. Pet. App. 9a. Second, the District Court analyzed Joyce's testimony because the Agency relied on her testimony as the predicate for arguing the existence of past discrimination. The District Court concluded that Joyce's testimony on the issue of discrimination was entitled to little weight because "[t]here is no evidence in the record that Joyce was denied assignment as a Road Maintenance Worker because she was a woman." The denial of coveralls "may be indicative of discriminatory intent on the part of Mr. Baldanzi, but by itself does not constitute adequate proof of historical justification for an Affirmative Action Plan." Pet. App. 9a. The District Court also noted that the grievance process addressed such incidents and "I do not feel that these incidents tend to show that the plans were adopted to break down 'old patterns of segregation and hierarchy.'" Pet. App. 9a.

Based on the above findings by the District Court, left undisturbed by the Court of Appeals, there was no evidence of past practices or patterns of discrimination that merited the use of the affirmative action plan and there was no other basis to claim any remedial purpose.

This absence of past practices or patterns of discrimination against women meant that the plan merely addressed societal attitudes and attempted to reach statistical parity.[31] This alone cannot give the plan a legitimate remedial purpose that would be a basis for finding a compelling state interest.

III. EVEN IF THE AFFIRMATIVE ACTION PLAN WAS SUPPORTED BY A COMPELLING OR EVEN IMPORTANT STATE INTEREST, IT IS NOT NARROWLY TAILORED TO CONSIDER ANY LESS RESTRICTIVE ALTERNATIVES AND IT UNNECESSARILY TRAMMELS INDIVIDUAL RIGHTS.

A. The Agency's Affirmative Action Plan Imposes Disproportionate Burdens on The Individual Employee Who is Not a Member of a Protected Class and Unnecessarily Trammels His Rights.

The plan was not narrowly tailored to avoid imposing disproportionate burdens on other employees and unnecesssarily trammeled their rights. The Court of Appeals incorrectly held that it was unnecessary to consider whether the plan unnecessarily trammeled Petitioner's rights.

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[31]As argued above, the affirmative action plan should be judged under the compelling state interest standard. However, the outcome would not be different if the Court applied the important state interest standard used in Fourteenth Amendment sex discrimination cases. *See Craig v. Boren,* 429 U.S. 190 (1977); *Reed v. Reed,* 404 U.S. 71 (1971). Eliminating statistical disparity in job classifications when the numbers are the product of self selection rather than employer discrimination is not a weighty justification for blatant sex discrimination.

Also, as discussed in the next section, the Agency's plan as applied is not tailored to prevent harm to innocent male employees. The plan does not satisfy the requirement that it must be substantially related to the achievement of the Agency's purpose. *Craig v. Boren.*

The Ninth Circuit stated: "[T]he instant case differs markedly from *Weber* and *La Riviere* in that it does not involve the admission of numerous applicants into a training program. Rather, it concerns the selection of one applicant for a single opening. When there is but one opening, the selection of one candidate will necessarily result in exclusion of all others." Pet. App. 28a.

The impact of the affirmative action plan on Petitioner's rights, by denying him a promotion, is precisely what makes this plan unlawful. In *Wygant,* this Court held that affirmative action for one group at the expense of the individual is only lawful if there is a compelling government interest and the means are narrowly tailored.[32] Even under *Weber,* remedial burdens imposed upon innocent third parties are only justified when they are diffused among many persons or have minimal impact. *See Wygant* at 4483, n.9; *Local 28 Sheetmetal Workers v. EEOC,* 54 U.S.L.W. 4984, 5000 (U.S. June 24, 1986).

The legislative history of the 1972 amendments to the Civil Rights Act that extended Title VII to public employers shows that non-minority employees were to be equally protected from discrimination:

> While discrimination because of race, color, religion, national origin, or sex is the thing specifically prohibited, the existing law, (Title VII of the Civil Rights Act of 1964) protects every individual in this country. Whites, no less than black workers, may in some instances be discriminated against as is alleged in "re-

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[32]An affirmative action plan should impose only those burdens directly related to the identified remedial purpose. *Parker v. Baltimore & O.R.R. Co.,* 652 F.2d 1012 (D.C. Cir. 1981).

> verse discrimination'' on men as well as women. The prohibited acts may not be committed against ''any individual'' as the law specifies throughout Title VII.
>
> Discrimination in employment violates our concepts of justice and equality as expressed in the Declaration of Independence, our constitution, and the Civil Rights Act of 1964. The only legal room for disagreement is the means of implementing the national policy.

Legislative History at 205.

Here, Petitioner was denied a well-earned promotion solely on account of his sex.[33] The District Court expressly found that Petitioner was the best qualified candidate for the job and that ''[b]ased upon the testimony of Graebner, Ex. 13, and the whole chronology of events as described by plaintiff, Joyce, and other witnesses, I am satisfied by a preponderance of evidence that the gender of Joyce was *the determining factor* in her selection.'' Pet. App. 4a.

Petitioner had just missed being promoted to Road Dispatcher in 1974 by placing second in the examination process. RT, Vol. I, 129:6-11. Rather than be denied again, Petitioner went out on the roads, because experience as a Road Maintenance Worker II was relevant to the job of Road Dispatcher. RT, Vol. I, 128:12-19. This was a demotion and required hard physical labor. RT, Vol. I, 127:13-20. He waited five years to compete for the next opening for Road Dispatcher because there were only two Road Dispatchers in the Agency and no opening occurred until 1979. Petitioner did well in the interviews and

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[33]This is a classic case of disparate treatment under Title VII even though Johnson is a white male. *United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711 (1983); *Tex. Dep't. of Community Affairs v. Burdine*, 450 U.S. 248, 251 (1981).

was unanimously recommended. Just when Petitioner believed that the promotion was his, the Director of the Agency reversed the recommendation of the Roads Division Superintendent,[34] who would normally have made the appointment, without any serious attempt to compare the candidates' qualifications, and appointed Joyce on the recommendation of the Affirmative Action Officer. If Petitioner had not been aided by the District Court's order, he would have retired without ever having been promoted, even though he was clearly the most qualified candidate.

There were no new jobs in the Agency, except for the Transit Division,[35] whose bus fleet grew significantly.[36] The plan noted that 734 new jobs were authorized by the Board of Supervisors to further enlarge the bus fleet. J.A. 59. However, no similar increases in positions were planned for other Agency divisions. J.A. 59-60.[37] In fact, Proposition 13 was expected to require cutbacks. J.A. 61. Budget constraints and low turnover made the use of affirmative action that much more burdensome on the unprotected employees. The plan noted that these factors

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[34]RT, Vol. II, 94:11-25, 95:1-2.

[35]The Agency was comprised of six divisions, including the Roads Division and the Transit Division.

[36]According to the plan, the new jobs in the Transit Division pertained to the expansion of the bus fleet and accounted for much of the increases in female (8.5% to 22.4%) and minority (11.3% to 31.6%) representation between 1973 and 1978. J.A. 45, 49.

[37]The Ninth Circuit's statement that there were new positions misread the record, because none of the new jobs applied to the Roads Division or this promotion. Pet. App. 59-60a.

made it difficult to meet the goal of statistical parity. J.A. 59-61.

The plan also trammels on the rights of the unprotected employees[38] by not differentiating between entry level and promotions or layoffs. This unfairly disrupts the expectations of the unprotected employees because their experience and performance will not necessarily count when competing for a promotion since the goal of statistical parity applies to each and every job. In *Wygant*, this Court held that voluntary affirmative action cannot justify racially based layoffs of more senior employees. While this is not a layoff case, the same expectations and unfairness apply here. Johnson had worked for the County since 1967. He had been working toward that promotion for five years only to have the promotion denied him in the name of affirmative action.

The Director's "leap frogging" of Joyce over Johnson crossed the line between permissible and impermissible affirmative action.[39]

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[38]Beals, the interim Affirmative Action Coordinator, testified that white males were not members of protected groups and would never receive special consideration pursuant to the plan. RT, Vol. II, 234:16-24.

[39]The legislative history shows that Congress did not intend to authorize "leap frogging."

> There are those who would make H.R. 1746 appear as a scheme to allow blacks to leapfrog over others at the expense of white workers. Not only does this ignore the entire issue of sex discrimination, which involves more white than black women, but it overlooks entirely the experiences already recorded in the 32 states with cease-and-desist enforcement power where past dire predictions have been proved entirely false.

Legislative History 204, 255.

The facts show that the plan's goals of opening opportunities and removing barriers to employment had in fact occurred. J.A. 31. Joyce was not denied entry into the job of Road Maintenance Worker II. The District Court expressly found that she had never been denied an assignment in that position. Pet. App. 4a. Special training was never required for Road Dispatcher, although experience in road maintenance was believed to be relevant. J.A. 24. Consequently, Graebner's reliance on the fact that no women were employed in the Skilled Craft Worker job classification as a basis for promoting Joyce was misplaced. The reasons identified in the plan for the overall lack of women in Skilled Craft Worker positions had nothing to do with the position of Road Dispatcher.[40]

The unfairness to Petitioner is only underscored by the fact that the job was misclassified. The Director testified that the Transit Division dispatcher job was classified as Office and Clerical, which was not underrepresented by women. RT, Vol. I, 32:9-19. When asked to identify the special manual skill required for Road Dispatcher, Graebner could only offer "operating office equipment." RT, Vol. I, 32:20-21. Neither the District Court nor the Court of Appeals addressed this issue.

No barrier existed with respect to the Road Dispatcher job other than experience. J.A. 24. The requirement of experience was sex neutral here. Johnson had worked for 17 years for Pacific Cement and Aggregate Company as a dispatcher. He had worked for another 13 years for the

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[40]The plan noted that many positions in the Skilled Craft Worker classification required special training, e.g., mechanics for bus maintenance. J.A. 56. The Agency instituted a training program to address this entry level prerequisite. J.A. 50, 77.

Agency. By the time that he was competing for this job, he had more experience and by virtue of this experience was more qualified. The Director's blind adherence to numerical goals resulted in the appointment of the less qualified woman to a job having no sex-based barriers in the first place.

B. The Plan Is Not Narrowly Tailored to Consider Less Restrictive Alternatives.

There is nothing in the affirmative action plan to indicate any effort to narrowly tailor the actions to be taken. The plan only addressed the rights of protected classes, which are defined as

> legally identified groups that are specifically protected by statute against employment discrimination. Unlike "affected class" which must be demonstrated, protected class status is automatically conferred upon recognized minority group members, females, disabled, by virtue of the law or other court decisions interpreting the law.

J.A. 130.

As the interim Affirmative Action Officer testified, the employees who are not members of protected classes are "unprotected," having no rights under the Civil Rights Act, as it is administered by the Agency.[41] RT, Vol. II, 243:16-24.

The plan stated as its major premise that it was not sufficient to provide equal opportunity "to remedy the effects of past discrimination" but that "affirmative aggressive and continuing actions are necessary." J.A. 31, 54, 65.

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[41]The plan's exclusion of employees who are not members of a protected group violates the premise that Title VII protects all individuals. *McDonald v. Santa Fe Transp. Co.*, 427 U.S. 273 (1976).

The plan's objective was to "reflect the ethnic and sexual make-up of the area work force." J.A. 31, 34, 38, 54, 112, 113. To achieve this mirror image of the county work force, the plan sought statistical parity for each job in the Agency and set as its employment goal 36.4% women in each job. Statistical parity started with the Agency as a whole, then each EEOC job category,[42] and finally each of the County's 118 job classifications. J.A. 38, 54. The figure 36.4% was based on the 1970 census data reflecting the number of women in the work force. J.A. 54. This goal was never changed from its first appearance in the County's 1972 Affirmative Action Plan. J.A. 38, RT, Vol. II, 241:12-24.

The employment goal of 36.4% in the plan was not based on the number of women in the County work force who were potentially qualified for the underrepresented job categories. This figure did not take into account women who had specific training, *e.g.*, teachers, paralegals, nurses, lab technicians, etc., and who would not be likely to change careers for a nontraditional job with the Agency.

The Agency's Personnel Officer correctly testified that the goals were unrealistic. RT, Vol. II, 262:6-20. She also testified that the County had no way of maintaining reliable statistics on the number of applicants and their qualifications, because the County lacked computer capacity. RT, Vol. II, 272:8-11.

The employment goal (36.4% women) for the Roads Division was the same as that for the Transit Division,

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[42]EEOC guidelines include skilled craft worker, technician, protective services worker, para-professional, professional, official and administrator, office and clerical, and service and maintenance job categories. J.A. 58-59.

which had added hundreds of new positions. J.A. 58-60. The plan conceded that it was difficult to set goals for jobs with less than 3 people, J.A. 56, and yet 70 of the County's 118 job classifications had less than three people, including the position of Road Dispatcher. Here there were only two Road Dispatcher positions. With Joyce's appointment to the Road Dispatcher position, it was 50% female.

The plan placed substantial if not overriding emphasis on the Agency managers to increase female representation. The Board of Supervisors "charges and holds the County Executive accountable for developing, implementing and administering" an Affirmative Action Plan. J.A. 113. The County Executive, in turn, holds each Director "personally responsible" and "[t]he degree to which each Agency Division attains the Plan's objective will provide a direct measure of that Division Director's personal commitment to the EEO Policy. . . ." J.A. 35. The Board "will consider the commitment to and results attained by each Department/Agency Director in carrying out the Board of Supervisors EEO Policy as an important element in evaluating their effectiveness as managers." J.A. 114, 120.

Eliminating underrepresentation of women in the Agency was a priority, J.A. 51, and the results from affirmative action were to be statistically measurable. J.A. 35, 114. A manager or director had to report his progress in reaching the numerical goals each year to the Board of Supervisors. J.A. 74. Whenever he did not hire a member of the protected class, he had to submit a written explanation of his reasons. J.A. 61, 79.

While the plan admonished its employees not to treat the goals as quotas, the testimony and the plan prove that

the goals were used to discriminate as if they were quotas.[43] The Agency Director testified that Morton intervened as the Affirmative Action Director to recommend that Joyce be promoted because she was the only applicant within a "protected class." Pet. App. 19a.

> Q (DAWSON) Mr. Morton felt that Diane Joyce should be appointed?
>
> A (GRAEBNER) Mr. Morton *was less interested in the particular individual;* he felt that this was an opportunity for us to take a step toward meeting our affirmative action goals, and because there was only one person on the list who was one of the protected groups. He felt that this afforded us an opportunity to meet those goals through the appointment of that member of a protected group.

RT, Vol. I, 18:1-8 (emphasis added).

Graebner testified that he too viewed the promotion as making a small dent in the numbers. RT, Vol. I, 64:10-12. The plan's provisions illustrate the pressure placed on the Agency managers to meet their numerical goals regardless of the impact on the unprotected employees. Graebner's testimony stands as a graphic example of an administrator's response to such pressure.

In this case, an Agency manager had little discretion not to award a job to a member of a protected group, if one were on the list. The absence of new positions and the low turnover made it very unlikely that an "unprotected" employee would get a promotion when it was so difficult for the Agency to meet its affirmative action goals. Even

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[43]The plan stated that these goals "should not be construed as 'quotas' that must be met" but "should rather be seen as realistic desired levels of achievement correcting imbalances in a Division's work force." J.A. 64.

though the plan recognized many of these problems, its only response was that given the low turnover and lack of new jobs, it was even more important to give protected employees special consideration. J.A. 60.

IV. EVEN IF WEBER WERE APPLICABLE TO THIS CASE, THE AFFIRMATIVE ACTION PLAN IS UNLAWFUL UNDER THAT DECISION.

Even if this Court finds that the Agency's affirmative action plan can be reviewed under the same standard as that of a private employer in *Weber*, it is clear that the Agency's affirmative action plan is still unlawful. The Court of Appeals expanded the narrow exception for voluntary affirmative action in *Weber* far beyond its permissible boundaries. The Court of Appeals' decision would permit not only plans with no legitimate remedial purpose but also plans which impose disproportionate burdens on other innocent employees and trammel their individual rights unnecessarily. Even a plan with a legitimate remedial purpose must be substantially related to remedying past discrimination and any remedies used must be narrowly tailored. *Parker v. Baltimore & Ohio Railroad Co.*, 652 F.2d 1012 (D.C. Cir. 1981). The pressure to have affirmative action, often well-intentioned, makes it imperative that such voluntary plans be reviewed with the presumption that they are not lawful unless there is a legitimate remedial purpose and the means used are narrowly tailored and do not unnecessarily trammel the rights of individual employees.

In *Weber*, this Court created a narrow exception to Title VII's explicit prohibition of discrimination on the

basis of race.[44] The rationale was that the use of race in a private employer's voluntary affirmative action plan mirrored Congress' purpose of encouraging voluntary efforts to end discrimination.[45]

Here there was no past discrimination to remedy. The lack of new positions, the low turnover in the Roads Division of the Agency, and the unrealistic employment goal for women all combined to impose significant hardship on any unprotected employee. There was no diffusion of the burdens because the goals applied to every job in the Agency. Unlike the plan in *Weber*, there was no dual list that allocated half of the job training slots to nonminority employees. So long as a minority or a woman applied for the job of Road Dispatcher, Johnson or any other unprotected employee would be denied the promotion. The plan made no distinction between hiring and promotions or transfers. The unrealistic nature of the employment goal and the scope of the plan created an absolute bar to promotion for Johnson or any other unprotected employee when competing with a protected employee.

Moreover, the plan had no discernible end. The District Court relied substantially on the testimony of the

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[44]Since *Weber* did not involve a public employer, the Fourteenth Amendment was not a consideration. However, under Title VII, race and sex are treated equally.

[45]In *Weber*, the Court did not address what is impermissible, holding that the plan was designed to break down old patterns of racial segregation and hierarchy, the plan did not unnecessarily trammel the interests of the white employees, or create an absolute bar to the advancement of white employees, and it was temporary, with no intent to maintain racial balance. *Weber*, at 208.

Agency Director in so finding. Pet. App. 7a. Graebner testified that the affirmative action plan applied until each and every job met its goal, that the plan was a permanent part of the agency's operating philosophy, and that there was no specific time table. RT, Vol. I, 49:4-14, 23-25, 50: 1-4, 23-25, 61:18-21.

Neither the County nor the Agency employees charged with administering the program could agree on whether the plan ended, and if so, when it would end. The Director testified that he saw the affirmative action plan as a permanent part of personnel decisions in the Agency. RT, Vol. I, 61:18-21. His testimony was never rebutted by other witnesses. The interim Affirmative Action Officer testified that she believed that the plan would expire when the goals were met. However, she could not point to a single document stating that policy. RT, Vol. II, 241:22-25, 242:1-7, 23-25, 243:1-15. The Personnel Officer stated that she thought that the Plan lasted for 5 years. RT, Vol. II, 272:21-25. This confusion is understandable, since the plan used the word "Continuous" as the timetable for each goal, responsibility, and task and never stated when it would end. J.A. 61-96. This divergence of understanding about a key provision in the plan shows that there was no end date for the affirmative action plan. It is disingenuous to call this plan temporary. Given the unrealistic and probably unattainable employment goals for women, the plan was temporarily permanent.

The Court of Appeals in its amended opinion did not disturb the District Court's finding of fact that the plan had no end date. Instead, the court held that the finding of fact was irrelevant. Pet. App. 49a. This as-

sumption contradicts the guidance provided in *Weber* and impermissibly increases the burden on the "unprotected" employees, who have no way of knowing how long their job rights will be adversely affected in the name of affirmative action. Without an end date, a so-called remedial measure is indistinguishable from a permanent employment policy.

While this appeal does not address the racial preference in the plan, the Agency's treatment of its racial employment goal implies an intent to maintain rather than merely attain a racial balance. Between 1974 and 1979, the percentage of minority employees increased to the point that it exceeded the goal. However, the Agency retained its hiring goals to ensure that statistical parity would be achieved in every job classification. J.A. 36. Presumably, if the number of minorities had dropped through layoffs or other cutbacks, the affirmative action plan would apply again in order that statistical parity be achieved in each job. Otherwise the Agency would not meet the plan's goal of having its work force mirror the ethnic and sexual composition of the work force in the entire county.

The affirmative action plan does not meet any of the concerns raised by this Court in *Weber* and thus, the plan cannot excuse the Agency's unlawful discrimination.

V. PETITIONER CONCLUSIVELY PROVED THAT THE COUNTY INTENTIONALLY DISCRIMINATED AGAINST HIM AND THAT THE AFFIRMATIVE ACTION PLAN IS NOT A LEGITIMATE REASON FOR SUCH DISCRIMINATION.

Just as *Weber* does not govern the review of the affirmative action plan, this Court's decision in *McDonnell*

Douglas Corp. v. Green, 411 U.S. 792 (1973), offers no guidance as to the correct allocations of proof and the burdens of persuasion in this case. Judge Wallace identified precisely this problem in his concurring and dissenting opinion, arguing that he would vacate the decision and remand the case to the District Court because the findings of fact were insufficient and allocations of burdens of persuasion were incorrect. Pet. at 32a. Although not completely clear from the opinion, the District Court seemed to apply the *McDonnell Douglas* approach to this case. Any error was clearly harmless and remand is unnecessary.

In *McDonnell Douglas,* the Court established the procedure to determine whether an employer considered an impermissible factor in making an employment decision when there is no direct proof of intent to discriminate. This test does not apply here, because there was overwhelming evidence that Joyce was selected on account of her sex. Moreover, the Agency argued, as a separate defense, that "it acted legally in affirmatively placing women in positions traditionally held by men[,]" J.A. 13, and bore the burden of proving that defense.

The District Court found that "Based on the examination results and the departmental interview, plaintiff was more qualified for the position of Road Dispatcher than Diane Joyce." Pet. at 12a. The District Court explained that this finding was based on

> the testimony of Plaintiff, Joyce, Davis, DiBasilio, and Beals. Graebner's testimony that the applicants are essentially equal in qualification is not compelling because he appeared to rely primarily upon the posted scores, and did little or nothing to inquire into the results of the interview process and conclusions which

Beals described as of critical importance to the selection process.

Pet. App. 3a.[46]

The Agency Director admitted that sex was a factor in Joyce's promotion, but claimed that he "looked at the whole picture." RT, Vol. I, 68:14-25, 69:1-24. However, when questioned closely Graebner admitted that he did not examine the applications, the results of the two interviews, or the applicants' files. RT, Vol. I, 18:12-24. The Director admitted that he had no basis for distinguishing between Joyce and Petitioner in making the promotion decision other than sex. Based on this testimony, the District Court determined that sex was the determining factor, Pet. App. 14a, and the Court of Appeals did not disturb this finding of fact. Pet. App. 20a. The evidence of intentional discrimination was direct and for all practical purposes uncontroverted.

When the Agency asserted that the promotion was pursuant to a bona fide affirmative action plan, it bore the burden of proving its defense. The Agency, using the plans, exhibits, and the same witnesses called by the Petitioner, attempted to establish that the affirmative action plan met the guidelines set forth in *United Steelworkers of America v. Weber*, 443 U.S. at 200.

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[46]Beals, the interim Affirmative Action Officer testified that she would have determined who was best qualified based on an interview process such as was used here. RT, Vol. II, 234:6-22.

As stated by Judge Wallace, the defense of a bona fide affirmative action plan is really an affirmative defense and the employer should be obligated to prove it. This conclusion is contrary to the majority decision of the Court of Appeals which used *McDonnell Douglas* to find that the employer need only offer some evidence that the plan is valid for it to serve as a complete defense. This forces the complainant to show not only that he was the victim of discrimination but also that the affirmative action plan is *per se* invalid.

This burden is inappropriate. First, the affirmative action plan is by its very nature discriminatory. Hence, it is not a "legitimate nondiscriminatory reason" under § 703(h). Second, because it classifies employees on an otherwise illegal basis, the presumption should be that affirmative action is unlawful and the employer should as a matter of policy carry the burden of showing that it is not unlawful in these circumstances.

Should this Court determine that *McDonnell Douglas* is controlling, the record, as discussed *ante,* proves that Petitioner successfully carried its ultimate burden of showing that the Agency had no legitimate nondiscriminatory reason for selecting Joyce over Petitioner for the job of Road Dispatcher. The record shows that the plan was never based on past or present patterns or practices of discrimination that would give the plan a remedial purpose. Moreover, the record shows that the plan unneces-

sarily trammeled the rights of unprotected employees by not being temporary.

The District Court specifically applied the *McDonnell Douglas* decision to find that the Petitioner had established that the Agency plan did not meet the *Weber* guidelines as to its temporary nature and was intended to maintain given work-force percentages.

———o———

CONCLUSION

When examined under the strict scrutiny standard of the Fourteenth Amendment, the Agency's affirmative action plan lacked any compelling or substantial government interest, because there was no evidence of past patterns or practices of discrimination. A naked statistical disparity, apparently the product of societal attitudes, is not an adequate predicate to give the plan a remedial purpose. Even if the Agency had established a compelling (or substantial) governmental interest, the plan is still invalid because it was not narrowly tailored to avoid unnecessarily trammeling the rights of unprotected employees, like Petitioner. The plan's across the board preference for women applied to each job, notwithstanding the lack of new positions and low turnover. The operative effect of the plan was to bar unprotected employees from advancement. These characteristics, when coupled with the lack of an end date and intent to maintain the goals once achieved, also render this plan invalid under the

Weber guidelines. For these reasons, Petitioner urges this Court to reverse the decision of the Court of Appeals.

Respectfully submitted,

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No. 85-1129

In The
Supreme Court of the United States
October Term, 1986

PAUL E. JOHNSON,
Petitioner,

vs.

TRANSPORTATION AGENCY, SANTA CLARA COUNTY, CALIFORNIA, and SERVICE EMPLOYEES UNION LOCAL 715,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

May an employer, pursuant to a voluntary affirmative action plan which set no quotas or rigid preferences, consider gender as a factor in the decision to promote a qualified woman where women had been virtually excluded from the job category and where the employer had grounds to conclude that its own past practices may have been discriminatory?

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STATEMENT OF THE CASE

A. Introductory Facts and Background

Petitioner, Paul E. Johnson, filed this Title VII action against the respondent, Santa Clara County Transportation Agency [hereinafter referred to as the Agency][1], after the Agency promoted a well-qualified woman, Diane Joyce, to the skilled craft position of Road Dispatcher which the petitioner had also sought. A number of factors influenced the Agency's promotional decision, including its Affirmative Action Plan for increasing the employment of women in jobs where they had not traditionally been employed by the Agency. The justification for that Plan and its application to the promotion of Joyce are the focus of the case here as they were below.

B. The Challenged Promotion Decision

On December 12, 1979, the Agency announced a vacancy for the promotional position of Road Dispatcher in the Agency's Roads Division. Road Dispatchers assign crews, equipment and materials, and maintain records pertinent to road maintenance jobs. The minimum qualifications for the position were four years of previous dispatch experience or four years of road maintenance work for the County of Santa Clara. J.A. 23-25. At the time of this vacancy, the Agency had never employed a woman as a Road Dispatcher and employed no women in any other skilled craft job. J.A. 49.

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[1]The Santa Clara County Transportation Agency is an agency of the County of Santa Clara, a political subdivision of the State of California. J.A. 6. The job in question was in the Roads Division, one of seven divisions in the Agency (Administration, Aviation, Fleet, Roads, Bus Maintenance, Service, Transportation Development) Tr. 14-15.

By the final filing date of December 29, 1979, twelve County employees had applied for the promotion. No written test was administered. Tr. 57. Nine of the applicants were interviewed by a two-person oral board, which ranked William Kinnear first with a rating of 80. Petitioner Johnson was tied for second with a rating of 75. Joyce ranked next with a rating of 73. Three others also placed on the qualified list with ratings of 70 or 71. J.A. 26.

Under the Agency's civil service rules, the appointing authority had discretion to select any person who ranked among the top seven persons on a qualified list. Under this "Rule of Seven," the appointing authority had the discretion to appoint "a less qualified person over one rated as better qualified so long as both are within the top seven on the list." Pet. 4a (District Court Findings of Fact); *see also* Tr. 19.

Roads Division employees conducted their own interviews of the top candidates. Joyce believed that the interviewers on the second oral interview panel would not give her fair consideration. Her past experience with members of the panel led her to believe they were biased against her because of her sex. Tr. 81-82, 91. Previously, Joyce had filed a grievance against one of the panelists, James Baldanzi, because he repeatedly denied her requests for protective work clothing, although he routinely issued such clothing to male employees. Tr. 89-92. Joyce sat on a safety committee with another member of the panel, Glenn Foreman, and Joyce believed his continuous disagreements with her reflected his bias against her because of her sex. Tr. 82, 91. Joyce's concerns about this bias increased when the second oral interview was scheduled exactly at a time during

which, as she had previously notified the Superintendent,[2] she had planned to attend a work-related class. Tr. 95. Also, Joyce had heard rumors that Johnson had the job "sewed up" (Tr. 91), and she believed that "if that rumor is true, then all [candidates] above and beneath me were treated unfairly." Tr. 93.

The second oral board recommended that Petitioner Johnson be hired. Baldanzi testified that he regarded Joyce as a "rebel rousing, skirtwearing person," and "not a lady." Tr. 153, 161. He stated that Joyce "didn't have the experience that I was really looking for at the time." He testified that he believed she had only one-and-a-half or two years of road work experience, when in fact Joyce had almost five years of such experience. Tr. 151-153; J.A. 27.

Joyce called the County's Affirmative Action Office to express her concern that she might not be receiving fair consideration for the job. Tr. 95. In addition to her misgivings about possible bias on the second panel, Joyce was concerned as a result of past experiences which she believed were discriminatory. *See infra* pp. 8-9.

The Agency's Affirmative Action Coordinator, Victor Morton, reviewed the qualifications of the candidates and recommended to the Agency's Director, James Graebner, that Joyce receive the promotion. Tr. 26. The head of the Roads Division recommended Petititoner Johnson, but agreed that Joyce had performed well in her duties (Tr.

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[2]Subsequent to her appointment to the Road Dispatcher position, this Superintendent initially told Joyce that she got the job even though she was "not qualified." Tr. 100. This same Superintendent told Johnson that he had already been appointed, but "affirmative action got it reversed." Tr. 139, 194.

71) and was capable of performing the Road Dispatcher work. Tr. 25. Graebner questioned both the Affirmative Action Officer and the head of the Roads Division and found that they had "an honest difference of opinion" as to the qualifications of both candidates. Tr. 69. Graebner considered the matter for several hours over the course of a few weeks (Tr. 63), and concluded that the two candidates were equally capable of performing the work.[3] He then chose Joyce for the position based upon a number of factors. "I tried to look at the whole picture, the combination of her qualifications and Mr. Johnson's qualifications, their test scores, their expertise, their background, affirmative action matters, things like that. I believe it was a combination of all of those." Tr. 68.

Graebner also took into consideration the Agency's obligation "to hire, to promote, to give opportunity and training on an equitable, non-discriminatory basis." Tr. 49. Graebner was concerned about the fact that out of 238 skilled craft Agency employees, none were women; and that no women had even been employed in nonclerical positions in the Agency's Roads Division, with the exception of Joyce. Tr. 33, 210-11.

The disputed promotional decision was not Graebner's first implementation of the affirmative action plan. He had applied affirmative action considerations to make the

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[3]Director Graebner did not consider the difference in oral board scores of a couple of points to be a very significant factor in the decision making process. Tr. 57-58. He stated, "I knew they were relatively close, and that certainly, to my mind, if they were within a couple of points, I don't consider that a significant variation." Tr. 24. Nor did Graebner find a significant difference between Joyce and Johnson in terms of their experience. Tr. 74-75; *see also infra*, pp. 38-39.

final decision on promotions in the Agency on "probably half a dozen" occasions. Tr. 53.

C. The Affirmative Action Plans

Two Affirmative Action Plans apply to this case. One plan, the Affirmative Action Plan of the County of Santa Clara, [hereinafter referred to as the County-wide Plan] was intended to apply to all agencies of County government. A second plan [hereinafter referred to as the Agency Plan] was tailored to meet the needs of the Transportation Agency of the County of Santa Clara.

The County-wide Plan contained a long-range employment goal "to attain" a work force comprised of women, minorities and disabled persons in approximate proportion to the composition of the local labor market. J.A. 120. The County-wide Plan called for each County Agency to set short-term goals. J.A. 122. "The 'goals' established for each County Department/Agency should not be construed as 'quotas' that must be met. The 'goals' should rather be seen as realistic desired levels of achievement correcting imbalances in a Department/Agency work force." J.A. 123. In addition, the County-wide Plan directed the adoption of programs to "remove unnecessary barriers" that have prevented the County from attaining a work force reflecting the composition of the labor market in Santa Clara County. J.A. 112.

Pursuant to the mandate of the County-wide Plan and also to meet requirements imposed by the federal Urban

Mass Transportation Administration (J.A. 39),[4] the Agency Plan was adopted in December, 1978. J.A. 36.

Like the County-wide Plan, the Agency Plan established a policy to provide equal employment opportunity (J.A. 36), and set long-term goals "to attain" an Agency work force whose composition approximated that of the local labor force. J.A. 54. The Agency Plan provided for improved recruitment (J.A. 65), training programs (J.A. 77), and for special attention in filling positions where women or minorities were underrepresented as compared to their numbers in the local labor market:

> Attainment of the Agency's employment goals in all EEOC job categories and major job classifications will necessitate that the Agency Personnel Office and Division Directors give *special consideration* to affirmative action requirements in *every individual hiring action* pertaining to positions *where minorities, women and handicapped persons continue to be underrepresented.* This must be done so that no opportunity will be lost to assure that persons from these groups are provided the maximum possible opportunity for employment or career progression whenever such positions are filled either from outside the Agency or *by promotion from within.*

J.A. 60 (emphasis added).

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[4]Urban Mass Transportation Administration Equal Employment Opportunity Policies, Requirements for Grant Recipients, Circular 1155.1, Dec. 30, 1977, required each recipient of Federal grant funds to conduct work force analyses by race and sex for each job category compared to the labor market, and to provide for an affirmative action program for correcting any underutilization of affected groups. Employment goals were required for all job categories. Failure to carry out the program could result in termination of funding. *See also* 28 C.F.R. § 42.409 (1977).

The Agency Plan set no quotas, fixed timetables, or automatic preferences. It called for "realistic yearly employment goals" and provided for periodic review of the Agency's progress in meeting those goals. The goals were to be based upon the best available data as to the composition of the area labor force qualified for the positions. J.A. 64. For example, the Agency's 1982 plan, which was in effect at the time this case was tried, set a goal of hiring 3 women [about 6%] out of 55 anticipated new skilled craft positions. J.A. 143.

D. The Basis for Taking Affirmative Action

The Director of the Agency, James Graebner, as well as other managers from the Agency, testified at trial to a number of patterns, pratices and past occurrences which underscored their view that affirmative action was warranted.

The work force statistics set forth in the Agency Plan revealed a pattern that "[w]omen are the most underrepresented group in the agency" (J.A. 53), when compared with the local area labor force of 36.4% women. None of 238 of the Agency's skilled craft workers (J.A. 52) and only one of 110 road workers was a woman. J.A. 52. In the Roads Division, no women were employed in nonclerical positions except for Joyce. Tr. 220-221; J.A. 52. The Agency's entire work force was comprised of approximately 22% women, most of whom occupied clerical or bus driver positions. J.A. 49. The Agency Plan acknowledged that women had been discouraged from employment in certain jobs "because of the limited opportunities that have existed in the past for them to work

in such classifications" (J.A. 57) and because of unspecified "past practices." J.A. 31; Tr. 66.

Myra Beals, the former Assistant Personnel Officer for the Agency, testified about a number of Agency practices which she believed discriminated against women. For example, she said that the Agency had refused to hire pregnant women. Beals stated that supervisory employees had expressed the view that it "wasn't appropriate to hire women, but particularly not pregnant women. She won't even be able to fit through the door of a bus." Tr. 256.

Beals testified that women were "prevented from getting the training that was given to men in the identical position," and that this had an adverse effect on a woman's eligibility for promotion. Tr. 231. She noted that supervisors and co-workers in the Roads Division had stated that they would assign work based on feelings about "what was appropriate for women to do and what was not appropriate." Tr. 253.

As further evidence of past practice in the Roads Division, the job announcement for a Road Dispatcher vacancy in 1974 referred to the person occupying the position as "*he*" and described those performing road maintenance work in the Roads Division as "*men*." J.A. 20. When Joyce first transferred to the Roads Division in 1972 to work as a road yard clerk, both of her supervisors commented that "we wanted a *man*" for the job. Tr. 110-111 (emphasis added); *see also* Tr. 97.

Beals also testified about an incident in which Joyce had been harassed by a male co-worker in the Roads Division. He had been verbally abusive toward Joyce and had threatened to run her off the property with a forklift.

According to Beals, Joyce's supervisor resisted taking action. Tr. 254.

Agency Director Graebner testified that he knew of a number of charges regarding sex discrimination, both charges against individual employees and against the Agency as a whole. Although he was unaware of specific complaints regarding sex discrimination prior to his employment with the Agency in June 1978[5] (Tr. 42-44), he further testified that he was aware of Agency practices which persons both in and out of the Agency perceived as detrimental to equal employment opportunities for women. Tr. 65-66.[6] And, Graebner acknowledged in his 1978 preface to the Agency Plan that, "Agency employees . . . may have been subjected to discriminatory personnel practices in the past." J.A. 35.

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[5]One of these complaints pending at the time Graebner testified was a class action alleging discrimination against women in Agency service and maintenance positions. *Pacheco, et al. v. Santa Clara County Transit District, County of Santa Clara, et al.*, No. C 81-2950 RPA (N.D. Cal.1986). The individual case of one of the named plaintiffs resulted in a judgment in her favor on a hiring claim relating to the position of Utility Worker. The remainder of the class action was settled by consent decree. The decree provided, *inter alia:* hiring goals of 30% for women in new hires for the bus operator and service worker positions; damage awards of up to $35,000 for each of 14 plaintiffs; and a damage fund to be apportioned among certain class members. Copies of the Judgment of the District Court, dated January 29, 1986, and the Consent Decree, approved April 4, 1986, have been lodged with the Court.

[6]The petitioner has misrepresented the record by stating as fact that Graebner "was not aware of any past or present practices or policies which discriminated against women." Pet. Br. 7, *citing* TR. 39:10-16. While not conceding any "continued specific policy that's been detrimental" (Tr. 65), the Director acknowledged charges of sex discrimination in skilled craft jobs in the Roads Division. Tr. 42-44.

E. Decisions Below

The District Court found that "based on the examination results and the departmental interview," Johnson was more qualified than Joyce and that the "gender of Joyce was *the determining factor* in her selection," (Pet. 4a) (emphasis in original). The District Court rejected the Agency's defense that consideration of gender was a permissible affirmative action. The District Court ruled that the Agency had the burden of proving that its affirmative action plan was a *temporary* measure within the meaning of *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979). (Pet. 8a, 14a) and that the Agency had failed to sustain that burden. The District Court commented that the Agency had also failed to meet its burden of proving sufficient "historical justification" for its affirmative action plan, but the court expressly declined to base its ruling on that ground. Pet. 9a.

The District Court ordered Johnson promoted to the position of Road Dispatcher, awarded back pay, differential pay until he actually received the promotion, and attorneys fees. J.A. 147, 148. The District Court order has been fully satisfied.[7]

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[7]Johnson was promoted to the position of Road Dispatcher, from which he retired during 1985. The Petitioner seriously errs in stating that Johnson did not receive full pay as ordered by the Court. Pet. Br. 10, n.17. His pay was adjusted effective December 19, 1982. This raises the issue of whether Johnson still retains a concrete interest in the outcome of this litigation, or whether subsequent events have rendered this case moot. Since

(Continued on next page)

On appeal, the Court of Appeals for the Ninth Circuit reversed. The panel majority held that the District Court erred by ruling that the Agency's plan was not temporary. *Johnson v. Transportation Agency, Santa Clara County, California*, 770 F.2d 752, 756-57 (9th Cir. 1985). The majority, also relying on *Weber*, held that evidence of a "conspicuous imbalance in [the employer's] work force" was sufficient to establish the need for the Agency's remedial affirmative action plan. Pet. 13a, 26a; 770 F.2d at 758 & n.4. The Ninth Circuit concluded that the Agency plan would neither bar men from promotional opportunities nor unnecessarily infringe their rights. Pet. 27a-29a, 770 F.2d at 759.

SUMMARY OF ARGUMENT

Where an employer has a firm factual basis for concluding that discrimination may have occurred in its own employment setting, it should be permitted under Title VII to take voluntary race or gender conscious remedial measures. In this case, the factual predicate for taking gender conscious action was twofold. First, the Agency was

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(Continued from previous page)

Johnson has retired, his only possible remaining interest in this case pertains to whether the County can obtain reimbursement of the attorneys fees and damage amount it has already paid Johnson. But for this issue, the case would be moot. Compare *De Funis v. Odegaard*, 416 U.S. 312 (1974) where a law student's race discrimination claim was rendered moot because he had nearly graduated by the time his case came before this Court.

aware of a statistical pattern which showed that in several Agency jobs women were severely underrepresented as compared with the local labor market. Second, the Agency was aware of its own restrictive employment practices which may have contributed to this underrepresentation of women. Given this evidence, which was unrebutted at trial and which the Court of Appeals found to constitute a *prima facie* case of discrimination against women, the Agency had an ample basis upon which to voluntarily adopt a modest affirmative action plan. It should not have been necessary, under these circumstances, for the Agency to prove its own wrongdoing in order to redress discrimination which it reasonably believed may have occurred.

The affirmative action plan here was appropriately tailored to meet its remedial purpose. There were no quotas or rigid preferences. The Agency's flexible approach, permitting gender to be considered as one factor in decisions affecting only those jobs where women were underrepresented, was well designed to meet the remedial need perceived by the Agency. The Plan did not foreclose anyone's opportunity for employment. As applied to this case, the Plan's remedial purpose was met without placing an undue burden on the Petitioner. A promotion was postponed, but the Petitioner did not lose his job or the opportunity to compete for other positions.

The Petitioner did not meet his burden of proving either that the Agency's action served no remedial purpose, or that it placed a disproportionate burden on him. Therefore, the Petitioner should not prevail.

ARGUMENT

I. THE AGENCY'S CONSIDERATION OF GENDER IN PROMOTING A QUALIFIED WOMAN PURSUANT TO ITS AFFIRMATIVE ACTION PLAN DID NOT VIOLATE PETITIONER'S TITLE VII RIGHTS

A. An Employer May Take Voluntary Gender or Race Conscious Remedial Action if it Has a Firm Basis to Believe That Such Action is Needed To Remedy the Effects of Apparent Prior Discrimination.

The prohibitions against discrimination found in Sections 703 and 706 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-2(j) and 2000e-5(g) do not preclude employers from voluntarily using appropriate race or gender conscious practices as a means of carrying out the remedial purposes of Title VII. *United Steelworkers of America v. Weber*, 443 U.S. 193, 204-06, 205 n.5 (1979); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 339-40 n.20 (1977); *Local Number 93, International Association of Firefighters v. City of Cleveland*, 106 S. Ct. 3063, 3072, 3073 (1986).

Beginning with *Weber*, this Court has consistently recognized that Congress intended voluntary action to be the preferred course of achieving the remedial purposes of Title VII. *Weber*, 443 U.S. at 204-207; *Firefighters*, 106 S. Ct. 3072, 3073; *see also Local 28 of the Sheet Metal Workers' International Association v. EEOC*, 106 S. Ct. 3019, 3035-36, 3042-44 (1986).

Title VII does not restrict voluntary affirmative action to employers who admit or are found to have violated the law. *Weber*, 443 U.S. at 207-8 & n.7. Rather, there is an

"area of discretion left by Title VII" to employers voluntarily "to adopt affirmative action plans designed to eliminate conspicuous racial imbalance in traditionally segregated job categories." *Id.* at 209.

This Court in *Weber* did not delineate the showing required by an employer to justify affirmative action designed to eliminate race or sex underrepresentation. *Id.* at 208. The Court upheld the need for affirmative action in *Weber* based primarily upon statistical evidence that the employer's skilled craft workforce was comprised of only 1.83% black employees compared to a figure of 39% in the local labor market. *Id.* at 198-99.

Late last Term, the Court posed, but did not decide, the question of "what showing the employer would be required to make concerning possible prior discrimination on its part against minorities [or women] in order to defeat a challenge [to affirmative action measures] by non-minority employees based on § 703." *Firefighters*, 106 S. Ct. 3063, 3073 n.8; *see also id.*, at 3080 (O'Connor, J., concurring). Also last Term, the Court considered the related question of what showing is required to justify affirmative action by a public employer subject to the Fourteenth Amendment. In *Wygant v. Jackson Board of Education*, 106 S. Ct. 1842 (1986), the plurality "insisted upon some showing of discrimination by the governmental unit." *Id.* at 1847-48.

Although the *Weber*, *Wygant*, *Firefighters* and *Sheet Metal Workers* decisions do not fully describe the range of possible evidentiary showings that would justify race or gender conscious remedial action, these decisions sug-

gest a set of parameters against which to measure affirmative action plans. Throughout these decisions,[8] and at the heart of the question in this case, is the Court's recognition that an employer need not admit or be proven to have actually discriminated against others in order to justify affirmative remedial action.

The *Wygant* case provides helpful guidance, even though it was decided in the context of the Fourteenth Amendment.[9] The plurality opinion states that in order to take race or gender conscious action, a public employer must have "convincing evidence that remedial action is warranted, [t]hat is, . . . sufficient evidence to justify the conclusion that there has been prior discrimination." *Wygant*, 106 S. Ct. at 1848. Justice O'Connor's concurrence noted the Court's apparent agreement that, "[t]his remedial purpose need not be accompanied by contemporaneous findings of actual discrimination . . . as long as the public actor has a firm basis for believing that re-

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[8]In *Weber*, the Court's emphasis was not on the employer's own past practices or their effects, but, rather, on the existence of "conspicuous racial imbalances in traditionally segregated job categories." 433 U.S. at 209. Justice Blackmun's concurring opinion in *Weber* proposed a standard that affirmative action must be a response to an employer's "arguable violation," with an understanding that "in practice the emphasis would be on 'arguable' rather than on 'violation'." 443 U.S. at 211, 213 (Blackmun, J., concurring). In *Wygant*, the insistence upon "some showing of discrimination by the governmental unit" (*Wygant* 106 S. Ct. at 1847-48) is similar to the "arguable violation" approach.

[9]The Fourteenth Amendment was not raised in this case. Even if the Fourteenth Amendment had been raised below, the Agency's affirmative action here is consistent with the Fourteenth Amendment as interpreted in *Wygant*, 106 S. Ct. at 1848-49, as well as Title VII as interpreted in *Weber*, 443 U.S. at 208 See discussion *infra*, pp. 44-47.

medial action is required." *Id.* at 1853 (O'Connor, J., concurring. Justice O'Connor further commented that,

> The imposition of a requirement that public employers make findings that they have engaged in illegal discrimination before they engage in affirmative action programs would severely undermine public employers' incentive to meet voluntarily their civil rights obligations. [citation omitted] This result would clearly be at odds with this Court's and Congress' consistent emphasis on "the value of voluntary efforts to further the objectives of the law."

Wygant, 106 S. Ct. at 1855 (O'Connor, J., concurring), *citing Regents of the University of California v. Bakke,* 438 U.S. 265, 364 (1978).

The dilemma facing an employer, aptly characterized as being on "a high tightrope without a net beneath" (*Weber,* 443 U.S. at 210, (Blackmun, J., concurring), was recognized once again in *Wygant:* "[E]mployers are trapped between the competing hazards of liability to minorities if affirmative action *is not* taken to remedy apparent employment discrimination and liability to non-minorities if affirmative action *is* taken." *Wygant,* 106 S. Ct. at 1855 (O'Connor, J., concurring) (emphasis in original).

Rather than requiring proof of actual discriminatory conduct, the *Wygant* plurality opinion requires the evidentiary showing to be sufficiently firm to support the *employer's* conclusion that remedial action is warranted. *Wygant,* 106 S. Ct. at 1848. Even when their actions are subject to the Court's strict scrutiny, public employers may take race conscious remedial action "on the basis of information which gives them a sufficient basis for

concluding that remedial action is necessary." *Wygant,* at 106 S. Ct. at 1855-56 (O'Connor, J., concurring).

By way of illustration, Justice O'Connor has suggested that statistical disparities, such as those present in *Weber* (and present in this case) would provide a firm foundation for affirmative action:

> Public employers are not without reliable benchmarks in making this determination. For example, demontrable evidence of a disparity between the percentage of qualified blacks on a school's teaching staff and the percentage of qualified minorities in the relevant labor pool sufficient to support a prima facie Title VII pattern or practice claim by minority teachers would lend a compelling basis for a competent authority such as the School Board to conclude that implementation of a voluntary affirmative action plan is appropriate to remedy apparent prior employment discrimination.

Wygant, 106 S. Ct. at 1856 (O'Connor, J., concurring).

To require an employer to produce more than substantial evidence from which it can be inferred that the employer may have discriminated would defeat several important policies underlying Title VII. The first such policy is that Title VII should prompt employers "to self-examine and to self-evaluate their employment practices." *Albemarle Paper Company v. Moody,* 422 U.S. 405, 418 (1975) (*cited with approval in Weber,* 443 U.S. at 204). The second and related policy is that Title VII's mandate to eliminate the effects of past discrimination should be principally achieved through voluntary compliance. *Alex-*

ander v. Gardner-Denver Company, 415 U.S. 36, 44 (1974); *Firefighters,* 106 S. Ct. 3063, 3072 (1986). A rule which requires employers to admit past unlawful acts, or which prohibits affirmative action in the absence of evidence that proves that an employer actually discriminated, would be tantamount to requiring employers to prove their own wrongdoing. Such a rule would effectively deter employers from self-examination and voluntary remedial action. *See, e.g., Wygant,* 106 S. Ct. at 1855 (O'Connor, J., concurring); *Weber,* 443 U.S. at 211 (Blackmun, J., concurring).

No majority of this Court has ever required an admission or finding of past discrimination by the employer to justify its voluntary affirmative action. A majority of the Court has, in separate opinions, wisely declined to impose such a burden on employers. *Wygant,* 106 S. Ct. at 1849 n.5; *id.* at 1855-56 (O'Connor, J., concurring). The Court should now hold that when an employer has a firm basis for concluding that past discrimination may have occurred—such as awareness of evidence that would constitute a *prima facie* showing of a Title VII violation —it may adopt appropriate race or gender conscious remedial measures.

B. The Agency Had a Firm Factual Basis for Concluding That Remedial Action Was Appropriate.

In this case, the Agency produced substantial evidence, both in the form of statistics and testimony concerning Agency practices, which supported the Agency's determination to take remedial action.

1. Statistical Evidence of a Conspicuous Gender Underrepresentation in the Agency's Road and Skilled Craft Positions Provided a Firm Basis for Believing that Remedial Action was Warranted.

Among the several factors the Agency Director considered in selecting a new road dispatcher, none was more important than the virtually complete exclusion of women from employment in skilled craft and road positions. Out of 238 skilled craft employees of the Agency, none were women. The Agency had never employed a woman road dispatcher. In the Roads Division, only one out of 110 road maintenance workers was a woman. J.A. 52. The lack of women in these jobs was especially troubling in light of the fact that women comprised more than 36% of the local area labor force and 22% of the Agency's work force as a whole. J.A. 49.

Based upon statistical disparities such as these, this Court has upheld inferences of prior discrimination by employers. As this Court first stated in *Teamsters*,[10] later reaffirmed in *Hazelwood*,[11] and most recently relied upon in *Wygant*,

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[10] *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 337 n.17 (1977) (a *prima facie* case was found in statistics which showed no minority line drivers compared to a 10-22% minority population in the surrounding communities and a 18-51% population in the cities proper).

[11] *Hazelwood School District v. United States*, 433 U.S. 299 (1977) (a *prima facie* case of discrimination was established by statistics that the school district teaching staff was comprised of 1.4% to 1.8% black teachers, in contrast to either 5.7% or 15.4% black area teaching force); *id.* at 308-09 & n.14; *see also id.* at 313-14 (Brennan, J., concurring).

> Statistics showing racial or ethnic imbalance are probative in a case such as this one only because such imbalance is often a telltale sign of purposeful discrimination; absent explanation it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired.

Teamsters, 431 U.S. at 340 n.20; *see also Hazelwood,* 433 U.S. at 307.

Statistical comparisons between an employer's workforce and the area labor market provide a reliable benchmark from which prior discrimination may be inferred. *Wygant,* 106 S. Ct. at 1856 (O'Connor, J., concurring); *Bazemore v. Friday,* 106 S. Ct. 3000, 3008 (1986); *Teamsters,* 431 U.S. 324, 340 n.20; *Hazelwood,* 433 U.S. 299, 307.[12] Even though Title VII imposes no requirement that an employer's workforce mirror the general population, (*Teamsters,* 431 U.S. 324, 340 n.20), where disparities are great, "they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination." *Hazelwood,* 433 U.S. at 307-08; *see also Teamsters,* 431 U.S. at 339.

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[12]Indeed, even comparisons with general population statistics may be probative. *Cf. Local 28 of the Sheet Metal Workers' International Association v. EEOC,* 106 S. Ct. 3019 (1986) ("there must be a substantial statistical disparity between the composition of an employer's workforce and the relevant labor pool, *or the general population,* before an intent to discriminate may be inferred from such a disparity.") *Id.* at 3060 (O'Connor, J., concurring in part and dissenting in part) (emphasis added). Here, the Agency compared its workforce to area labor statistics which are more probative than general population statistics. The Agency also compared its own job category statistics to its workforce as a whole.

In this case, the absence of women in certain Agency positions is comparable to "the inexorable zero" which this Court has identified as a telltale sign of discrimination. *Teamsters,* 431 U.S. 324, 342 n.23. Given the statistical indicia of past exclusion, the Agency was amply justified in its belief that remedial action was needed.

At trial, the Petitioner made no attempt to rebut the Agency's statistics. Now the Petitioner seeks to rebut the inference of discrimination derived from the statistics by suggesting that women lacked interest in skilled craft jobs. Pet. Br. 7, n.12; 29. In making this suggestion, Petitioner has misinterpreted that portion of the record upon which he relies,[13] and placed "substantial weight" (Pet. Br. 29, n.29) on testimony which the District Court expressly disregarded.[14] The Petitioner would have this Court conclude that the number of women qualified and interested in road work or skilled craft jobs was so low that it would be reasonable to expect to find *no* women employees out of 238 skilled craft workers and only one woman nonclerical employee in the Roads Division. This argument is groundless since there was no evidence that the percentage of women in the labor market was anything approaching

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[13]The witness testified that she thought the goal of 36.4% women was not realistic for some job categories perhaps because women lacked interest or "just by tradition had never trained for some of the jobs." Tr. 263. The Agency Plan acknowledged that lower goals were more realistic for some jobs (J.A. 58); and, for example, set a short term goal of 3 women out of 55 new hires in skilled craft jobs. J.A. 143.

[14]The District Court judge commented "We've been sitting here for three quarters of an hour with this witness, and I haven't gathered anything of probative value from her at all." Tr. 281.

zero.[15] It would be a rare job indeed for which absolutely no women qualify or show interest. *Cf. Dothard v. Rawlinson,* 433 U.S. 321 (1977) (employer's bona fide occupational qualification defense, § 703(e) of Title VII, sustained because female correctional counselors would pose substantial security problem in maximum security male penitentiaries).

The Agency reasonably assumed from the conspicuous lack of women in its own workforce, that the imbalance was not solely attributable to factors outside the Agency's control. The statistics are traceable at least in part to the Agency's own action. The *Agency* made each of the 238 skilled craft hiring decisions, none of which resulted in the hiring of a woman. The *Agency* was responsible for hiring no women for 110 road maintenance positions before it hired Joyce.

The extent to which the absence of women from craft jobs may have also reflected lack of qualified female applicants was never proven at trial. It was never shown, as the Petitioner framed the question, that the statistics were "unrelated to discrimination." Pet. Br. i. Rather, evidence of Agency practices presented at trial supports an inference that the complete absence of women may have been caused by discrimination, not merely by "inherent" female traits or preferences. In light of these statistical facts, and inferences which can be drawn from them, the

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[15]On the contrary, the Agency Director testified that "quite a number of females" are capable of handling even those jobs involving heavy lifting. Tr. 65. The Agency Plan stated that "there is an increasing percentage of women in the area who desire to work in nontraditional positions." J.A. 66.

Agency correctly looked first to its own work force patterns to assess the need for remedial action.[16]

2. The Statistics Were Buttressed by Evidence of Agency Practices Which May Have Discriminated Against Women.

In addition to the statistical disparity between the Agency's workforce and the local area labor pool, other evidence was presented to support the Agency's conclusion that remedial action was necessary. Agency personnel had refused to hire pregnant women, excluded women from training opportunities, and made work assignments based on feelings about what work was appropriate for women and what work was not appropriate.[17] *See supra,* pp. 8-9. None of these practices were rebutted by the Petitioner.

The Agency, and not "society," was directly responsible for these restrictive hiring and assignment practices. These practices provided a strong basis upon which the Agency could conclude that *its own actions* contributed to

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[16]The Government's attempt to minimize the weight of the Agency's statistical proof, absent extensive applicant flow data analysis, is unwarranted. U.S. Brief 24. As this Court has held, such "fine tuning of the statistics" cannot obscure "the glaring absence" of female employees, which gives rise to the inference of discriminatory intent. This inference derives "not from a misuse of statistics, but from the 'inexorable zero.' " *Teamsters v. U.S.*, 431 U.S. 324, 342 n.23 (1977).

[17]Restrictive hiring practices such as the refusal to hire pregnant women, are by themselves *prima facie* violations of Title VII. Section 701(k), 42 U.S.C. § 2000e(k). Gender-based assignment decisions were also *prima facie* violations of Title VII. *See* B. Schlei & P. Grossman, *Employment Discrimination Law* (2d ed. 1983), pp. 340-349. Such practices may have had an effect of discouraging women from even applying for jobs in the Agency.

the gross statistical imbalance.[18] Joyce's own experiences provided further evidentiary support for an inference that women may have been discriminated against in the Roads Division. (*See supra,* pp. 2-3, 8).[19]

In addition to the Agency practices specifically described at trial, both the Agency Plan and Director Graebner's testimony refer to "past practices" and other pending complaints of sex discrimination which had been brought against the Agency.[20] J.A. 35; Tr. 42-44, 65-66. These patterns and practices of the Agency provided a firm basis for its conclusion that it may have discriminated against women in its own employment practices and that voluntary remedial action should be taken. The Ninth Cir-

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[18]For example, the Agency's own 1974 announcement for the Road Dispatcher position referring only to "he" and "men" could obviously have the effect of discouraging women from applying for the position. Section 704(b), 42 U.S.C. § 2000e-3(b) prohibits job advertising which shows a preference for a particular sex. Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.5 states "It is a violation of Title VII for a help wanted advertisement to indicate a preference . . . based on sex . . .".

[19]The District Court agreed that an inference of "discriminatory intent" may be drawn from the incident involving denial of protective clothing, but concluded that this incident *by itself* did not justify an affirmative action plan. Pet. 9a. These incidents, however, should not be considered in isolation. The inference of discrimination is strengthened when these incidents are considered in concert with the stark statistical imbalances.

[20]Indeed, one of the complaints led to a District Court trial which resulted in a judgment that the *Agency's own hiring practices* had discriminated against women. *Pacheco, et al. v. Santa Clara County Transit District, County of Santa Clara, et al.,* No. C 81-2950 RPA (Judgment of the District Court, Jan. 29, 1986). *See supra,* p. 9 n.5. Although the outcome of this case was not known at the time of the decision to promote Joyce, it shows that, in retrospect, the Agency was more than vulnerable to a suit alleging discrimination against women.

cuit correctly found that "the statistics would make a *prima facie* case of discrimination" (Pet. 50a), and that "a plethora of proof" was not needed to support the Agency's attempt to remedy the pattern of underrepresentation.[21] Pet. 26a-27a. Nevertheless, the record also contained evidence of a variety of practices which both confirm and explain the inferences that could have been drawn from the statistics.

C. The Agency's Action was Appropriately Designed to Accomplish its Remedial Purpose Without Unnecessarily Limiting Opportunities for Others

This Court's major affirmative action decisions, whether based upon Title VII or the Equal Protection Clause, consistently state that the means chosen to provide an effective remedy for apparent prior discrimination must be limited in their scope and effect on others.[22]

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[21]This court need not decide whether given this evidence, the District Court finding of no discrimination against women was clearly erroneous. Nor must this Court decide whether the evidence supported the contrary Court of Appeals finding of a *prima facie* case of discrimination. Review of these conflicting legal conclusions reached by the courts below would miss the pivotal issue here, i.e., whether there was sufficient evidence to support the *Agency's* conclusion that it may have discriminated against women in the past and that affirmative remedial action was warranted. Indeed, here as in *Weber*, a lower court finding that the employer had not discriminated, *Weber* at 225, n.6 (Rehnquist, J., dissenting), was not dispositive.

[22]*See e.g., Weber*, 443 U.S. at 208 (Four factors made the plan permissible: (1) it did not "unnecessarily trammel the interests of the white employees;" (2) it did not "create an absolute bar to advancement of white employees;" (3) it was "a temporary measure;" and (4) it was designed "to eliminate a manifest racial imbalance" rather than "to maintain racial balance."); *Wygant*, 106 S. Ct. at 1850 (Powell, J., plurality opinion)

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Having concluded that some remedial action was necessary, the Agency adopted a modest affirmative action plan which was "within the area of discretion left by Title VII" for voluntary race or gender conscious relief. *Weber*, 443 U.S. at 209. The principal features of the Agency's Plan, and the context in which it was applied in this case, show that the Agency chose appropriate means to remedy a pattern of underrepresentation. Many elements of the Agency's Plan mirror the plan approved in *Weber*.[23] Like

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(under strict scrutiny, "the means chosen to accomplish the State's asserted purpose must be specifically and narrowly framed to accomplish that purpose"); *Id.* at 1852 (O'Connor, J., concurring) (adopting the same "narrowly tailored" standard); *Sheet Metal Workers*, 106 S. Ct. at 3051-52; (affirmative action goal was necessary to end discrimination; flexible application of the goal shows that its purpose was not to maintain racial balance; goal does not "unnecessarily trammel the interests of white employees"); *Id.* at 3061 (goals should be carefully tailored to remedy the violation, should be temporary remedial measures rather than efforts to maintain racial balance, should not unnecessarily trammel the interests of the majority and should avoid adverse impact on a "small, ascertainable group of nonminority persons") (O'Connor, J., concurring in part and dissenting in part); *Id.* at 3055 ("four factors" including "efficacy of alternative remedies," "duration of the remedy," appropriateness of numerical goal, and flexibility of plan) (Powell, J., concurring in part and concurring in the judgment) (*citing Fullilove v. Klutznick*, 448 U.S. 510-11 (1980) (Powell, J., concurring)).

[23]Under the *Kaiser* affirmative action plan, trainees for the promotion training program were selected on the basis of seniority provided that at least 50% of the trainees were to be black until the percentage of black skilled craftworkers in the plant approximated the percentage of blacks in the local labor force. *Weber*, 443 U.S. at 199. The plan did not unnecessarily trammel the interests of white employees, in part because it did not require the discharge of white employees and their replacement with new black hirees. The plan did not create an absolute bar to the advancement of white employees because half of those trained in the program would be white. The plan was temporary and not intended to maintain racial balance, but was to stop as soon as the percentage of skilled craftworkers approximated the percentage of blacks in the local labor force. *Id.* at 208-09.

the Kaiser plan, the Agency's Plan was remedial of a conspicuous imbalance; it did not unduly limit the rights of the majority; and it was to last only until the employer's work force composition approximated that of the labor market. One feature of the Agency Plan underscores its limited nature: it contained *no quotas or fixed preferences.* Rather, the Plan reserved to the Agency administration the discretion to select appropriate and effective remedies on a case-by-case basis.

1. The Agency's Plan Allowed it to Make Flexible Use of Tailored Remedies Without Imposing Fixed Numerical Preferences.

The Agency's Plan "recognized that mere prohibition of discriminatory practices is not enough to remedy the effects of past practices and to permit attainment of any equitable representation of minorities [and] women." J.A. 65. Accordingly, the Plan called for the Agency to scrutinize and, where appropriate, to modify the full spectrum of the Agency's employment practices. The Agency Plan applied to recruitment, testing, hiring, promotion, training, use of independent contractors, and employee evaluation procedures, all of which were to be considered pursuant to the remedial purposes of the Plan. J.A. 62-93.[24] Those provisions of the Plan are not the type of

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[24]The Plan (J.A. 133) specifically required that,

a. Employment by the Agency is kept freely open to all persons regardless of race, color, national origin, religion, sex, age or handicapped status.

b. Any possible barriers to employment and promotion of minorities, women and handicapped persons are removed.

c. Aggressive and imaginative continuing efforts are made to attract and assist minorities, women and handicapped persons to qualify for employment and promotion as needed to attain an equitable representation in all occupational fields and at all job levels.

measures that the Court has referred to as "affirmative action"; rather, they simply require no discrimination in the Agency's employment practi[illegible]

The Agency Plan's most [illegible]e affirmative action measure required that "special consideration" be given to protected group members in those job categories for which their group was underrepresented. J.A. 60. The Plan imposed no quota, fixed percentage, or numerical preference for any job. Nor was the "special consideration" provision a euphemism for any conclusive race or gender conscious preference. Rather, when applicable, consideration of race or gender was merely one factor to be weighed along with all other factors in reaching appropriate decisions.[25] Such other factors included experience, interview or test results, and other traditional measures of qualifications.

The Plan's flexible case-by-case approach, which treated gender imbalance as merely one factor in the decision-making process, stands in marked contrast to the more rigid preferences reviewed by the Court in *Weber, Bakke, Fullilove, Sheet Metal Workers' and Firefighters.*[26] The

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[25]Director Graebner testified that his special consideration of Joyce's sex was only one factor, whose weight could not be qualified, in the selection decision. Tr. 58-59.

[26]*Weber,* 443 U.S. 193, 198-99 (1979) (plan required 50% black admission to skilled crafts promotion training program); *Regents of the University of California v. Bakke,* 438 U.S. 265, 275 (1978) (16 out of 100 spaces to medical school reserved for minorities); *Fullilove v. Klutznick,* 448 U.S. 448, 453-54 (1980) (minority business enterprise provision of the Public Works Employment Act of 1977 required that at least 10% of federal funds granted for local public works projects must be used by the state or local grantee to contract with businesses owned by minority group members); *Sheet Metal Workers,* 106 S. Ct. at 3027 (29% nonwhite membership goal to be met by union); *Firefighters v. Cleveland,* 106 S. Ct. at 3069 (specified numbers of minority group to be promoted within shortened period).

Agency's approach excluded no qualified individual from consideration for any position. Unlike cases involving fixed ratios of new hires or trainees, the instant plan allowed every person an opportunity to compete for every position.

In contrast to cases involving dual hiring lists,[27] under the Agency's Plan, for *every* job, every applicant's qualifications had to be weighed against those of all other applicants. Any applicant among the top seven persons on the list of eligibles could be selected. The Agency's Plan thus operated within the Agency's existing merit system rules, rather than as an exception to them.

This flexible and discretionary case-by-case approach, with statistical race or gender underrepresentation being only one of several factors considered in employment decisions, is very similar to the approach preferred by Justice Powell in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). Under the Harvard admissions policy there discussed, the ethnic background of a person was one factor among many to be considered in deciding on admission to school. The Agency's Plan, like the Harvard policy, set no rigid quotas, permitted consideration of the individual merit of each applicant, and foreclosed consideration for no one on the basis of race or gender. *Id.* at 316-24.

In cases where rigid numerical goals are not necessary to remedy past discrimination, flexibility and discretion

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[27] *Compare Local 93, International Association of Firefighters v. City of Cleveland*, 106 S. Ct. 3063, 3069 (1986) (Appointments for minorities were made from a second civil service list. This could result in the promotion of persons who may not have been eligible for promotion, but for race-conscious relief).

are the preferred prescription for affirmative action plans. *See, e.g., Sheet Metal Workers,'* 106 S. Ct. at 3050; *Id.* at 3056-57 (Powell, J., concurring); *Id.* at 3059 (O'Connor, J., concurring in part and dissenting in part). The Agency Plan meets that prescription.

2. The Agency's Plan Was a Temporary Measure Designed to Correct an Existing Underrepresentation Rather Than to Maintain any Particular Balance.

The Plans' purpose was to *attain* an Agency workforce free of the gross underrepresentation of women which can be a telltale sign of past discrimination. No evidence was presented that the Plan was either designed or used to maintain any fixed percentages of women in the workforce, or that the Plan's "special consideration" feature would continue once the remedial goals had been attained.

The record contains substantial evidence supporting the Court of Appeals' conclusion that the Agency Plan's "special consideration" aspect was temporary, not permanent. Pet. App. 23a-25a; *Johnson,* 770 F.2d at 757. The County-wide and Agency Plan documents themselves specify no fewer than ten times that their purpose was "to attain" specified workforce percentages. *E.g.,* J.A. 31, 34, 54, 55, 58, 112, 120, 133, 135. *Not once* do the plans state or suggest a purpose to *maintain* a balanced workforce.

Graebner's testimony, on which the District Court hinged its findings of permanence, actually supports the view that the Plan's affirmative provisions were temporary. Graebner distinguished between the Plan's "broader goal" of equal opportunity, to which the Agency had made a permanent commitment, and those particular af-

firmative measures which were to be used as necessary to correct female underrepresentation.[28] The Agency's specific goal is repeatedly stated to be "measurable yearly improvement in the hiring, training, and promotion of [underrepresented groups] in the major job classifications . . . where these groups are underrepresented." J.A. 35. The specific goal of "yearly improvement" is consistent with the objective of moving from a deficit position *toward* a parity position, i.e., to correct underrepresentation. Such a statement is not consistent with *maintaining* a fixed balance. The testimony of Beals, the Agency's former Per-

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[28]Graebner testified:

"The broader goal of affirmative action is something which . . . is a permanent part of the Agency's basic operating philosophy. *So the broader goal is divorced,* if you will, *from specific numbers or percentages.*

In terms of the desire to hire, to promote, *to give opportunity and training on an equitable, non-discriminatory basis* as part of our operating philosophy, *that is a permanent part.*"

Q: "*. . . And that would include white males?*"

A: "*Right*".

Tr. 49 (emphasis added).

He further testified:

Q: "So as I understand it, . . . in your mind, . . . the transportation agency's affirmative action plan is not going to end?"

A: "That's correct".

Q: "And it's going to continue to be applied in order that the composition of the agency reflects goals, some goals?"

A: "Correct".

Q: "And that pertains to race and sex?"

A: "*Pertains to equal opportunity.* And those could be two measures where an *opportunity* should be afforded."

Tr. 58-59 (emphasis added).

sonnel Officer, confirmed that responsible Agency officials understood the transitional nature of the Plan's affirmative provisions.[29]

The Agency Plan, like the plans approved in *Weber*, 443 U.S. at 208-09, and *Sheet Metal Workers'*, 106 S. Ct. at 3052, had no express ending date. In all three cases, the specific affirmative provisions were to remain in effect *until* statistical indicia of underrepresentation were eliminated. Nothing in the Agency Plan required any further percentage-linked action once the Agency attained its goal of eliminating the existing imbalances. In this respect, the Plan comports with principles established by this Court in education cases, *e.g., Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 436 (1976) (permanence of the plan is relevant only if it is shown that the need for the plan no longer exists), as well as employment cases, *e.g., Wygant*, 106 S. Ct. at 1847; ("role model" justification for affirmative action invalid because, *inter alia*, it has "no logical stopping point" and would continue "long past the point required by any legitimate remedial purpose.") *Id.; Weber*, 443 U.S. at 208 (plan valid because, *inter alia*, it "is a temporary measure . . . not in-

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[29]Beals testified as follows:

"Q: Are you aware of any particular end date to any aspect of this affirmative action plan?

A: No . . .

Q: To your knowledge, it was going to go on in perpetuity?

A: My understanding is that it would go on *until the goals were achieved*. . . .

. . . *[I]n an area in which the goal had been met or exceeded, the plan had no role to play.*

Tr. 241-242 (emphasis added).

tended to maintain racial balance, but simply to eliminate a manifest racial imbalance.") *Id.*[30]

The Plan's temporary focus on "attaining" or moving toward a representative work force was complemented by the Plan's requirement of periodic adjustment of short-term goals and review of progress toward long-term goals. J.A. 87-89. The requirement that there be periodic review of the short-term goals and of the progress toward achieving the Agency's long-term goals typifies the Agency's cautious and gradual approach to redressing its apparent prior discrimination against women. Periodic review of the goals and progress toward reaching them facilitated the setting of *realistic* goals, rather than the opposite.[31]

Moreover, the simple fact that the Agency's plan called for periodic review and setting of realistic short-term employment goals served to protect it from moving beyond the narrow boundaries of permissible affirmative

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[30]The Court's concern with regard to the duration of the affirmative action plans reviewed in *Weber*, 443 U.S. at 208-09, and in *Wygant*, 106 S. Ct. at 1847, was heightened because, so long as those plans remained in effect, nonminority employees were precluded from consideration for some portion of job opportunities. In this case, there is no such group of positions or period of time during which males are removed from consideration. Although the Court's concern over the duration factor should logically be lessened in this case, the Agency's Plan nevertheless meets the temporal guidelines suggested in these earlier decisions.

[31]Periodic review such as provided in the Agency's plan was not "social engineering" or a casual effort to manipulate the composition of the Agency's work force, as has been suggested. U.S. Br. 9. No facts in the record suggest that the Agency had or would alter its long or short term hiring goals to unrealistic levels.

action. Periodic review assured that all segments of the community had an opportunity to observe the Agency's progress and to participate in the debate concerning the implementation of the affirmative action plan.[32] This review was to take place in the local forum as Congress anticipated when it enacted Title VII: "Congress was not legislating about 'preferential treatment or quotas in employment' because it believed that 'the problems raised by these controversial questions are more properly handled at a governmental level closer to the American people and by communities and individuals themselves.' " *Firefighters,* 106 S. Ct. 3063, 3074 (*quoting* 110 Cong. Rec. 15,893 (1964) (remarks of Rep. MacGregor)), citing *Weber,* 443 U.S. at 207-08, n.7.

3. The Agency's Action Did Not Unduly Limit Employment Opportunities for Men.

The Agency Plan did not "trammel upon" or unduly limit employment opportunities of male employees. In that respect, this case differs from the layoff cases that prompted the Court to express concern over the burden caused by the "loss of an existing job," *Wygant,* 106 S. Ct. at 1851.

In the Agency as a whole, employment opportunities were expanding during the time the Plan was devised and

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[32]In California, a public agency's actions are subject to the open meeting law. Cal. Gov't Code § 54950, *et seq.* (West 1980). Under this law, no action of the Transportation Agency Board to review or modify the affirmative action plan can be held behind closed doors. Similarly, under California law, public employees have a right to "meet and confer" on methods the Agency may pursue to change terms and conditions of employment. The employee's union representative, who has a duty to fairly represent all employees, may participate in negotiations concerning employment criteria, training programs, and affirmative action plans which affect terms and conditions of employment. Cal. Gov't Code § 3500 *et seq.* (West 1980).

implemented. Hundreds of new positions were being added. J.A. 59-60. During the years from 1978, when the Plan was first implemented, to 1982, the year when the trial took place, the skilled craft work force increased by 111 positions (from 238 to 349), but the number of females holding such jobs increased from zero to only six. J.A. 49; S.E.R. 84. Employment of men in skilled craft jobs thus increased by 105 jobs, or 42% over the 1978 level.[33] The Agency's own annual goals show that it expected and planned that most of these positions would be taken by men.[34] The 1982 yearly goals projected filling 35 skilled craft positions with 52 men and only three women. J.A. 143. The impact of the Agency's Plan on male employees was less than the effect on white employees of the promotional plan approved in *Weber*. That plan, although it reserved 50% of all positions for blacks, "[did not] create an absolute bar to the advancement of white employees [because] half of those trained in the program

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[33]Petitioner misrepresents the record in asserting that there would be no expansion of job opportunities in the Roads Division. Pet. Br. 17 ("lack of any new positions"), Pet. Br. 35 ("no new jobs in the Agency, except for the Transit Division"). The record actually stated that "the majority" or "most" of the hundreds of new positions were expected to be in bus related jobs, not all of them. J.A. 59. Some of the new jobs were in the Roads Division. In fact, another Road Dispatcher position was added in 1983.

[34]Petitioner's suggestion that the Agency Plan required the Agency to prefer women in every case is totally without evidentiary support. Pet. Br. 41 ("very unlikely" that men would be promoted [illegible]et. Br. 43 ("so long as . . . a woman applied," men would be "denied"). According to the Court of Appeals, there was no evidence of "a distinct pattern of exclusion of non-minority candidates." Pet. 29a. Moreover, the Agency is entitled to a presumption that it was applying the "gender factor" approach in good faith and not as a cover for the functional equivalent of a quota system. *See Bakke*, 438 U.S. 265, 318 (1978).

will be white." 443 U.S. at 208. *See also Sheet Metal Workers'*, 106 S. Ct. 3019 (upholding decree under which "a majority of those [hired] have been white.") *Id.* at 3052.

As a result of the promotion decision challenged in this case, Johnson lost, temporarily,[35] a future opportunity, but he was not displaced from his duties, seniority, or salary in his position as a road maintenance worker. This case is thus analogous to promotion plans upheld in *Weber* and *Sheet Metal Workers'*, and distinguishable from the lay-off preferences disapproved in *Wygant* and *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984) (city could not abridge collectively bargained last-hired, first-fired seniority system despite consent decree). The Agency's Plan, like the decree upheld in *Sheet Metal Workers'*, "will have only a marginal impact on the interests of [male] workers," *Sheet Metal Workers'*, 106 S. Ct. at 3053.

What differentiates the instant case from all of this Court's previous affirmative action decisions is the focus here on one particular competition for one job promotion. Although the Plan as a whole imposes little or no burden on males as a class, Joyce's selection had more than a "marginal" effect from Petitioner's perspective. However, the impact on Petitioner must be weighed in light of the necessary corollary to affirmative action: "[a]s part of this Nation's dedication to eradicating racial [and gender] discrimination, innocent persons may be called upon to bear some of the burden of the remedy." *Wygant*, 106 S.

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[35]The impact upon Johnson was short-lived because a new road dispatcher position was created in 1983, with the result that both Johnson and Joyce held road dispatcher jobs simultaneously. Thus, the practical effect of Joyce's promotion was merely to postpone Johnson's promotion.

Ct. at 1850. For over a decade, since *Franks v. Bowman Transportation Company*, 424 U.S. 747, 777-78 (1976), this Court has recognized that "such 'a sharing of the burden' by innocent parties is not impermissible," *Fullilove v. Klutznick*, 448 U.S. 448, 484 (1980) *quoted in Wygant*, 106 S. Ct. at 1850, even though such parties' good-faith expectations are compromised. In *Weber*, 443 U.S. at 208-09, and more recently in *Sheet Metal Workers'*, 106 S. Ct. at 3050-53, this Court approved voluntary adoption of remedial programs which impose such "burden-sharing" on third parties.

The fact that a single identifiable individual may in a particular case "be called upon to bear some of the burden of the remedy," is insufficient reason to invalidate the employer's affirmative action. It is impossible to diffuse the impact of an individual employment decision, for whenever one person is selected, others are necessarily left out. Ultimately, all affirmative action programs are implemented in reference to specific jobs and appointment decisions. If the Court's approval of the concept of affirmative action were to be cast aside here on the ground that another individual's expectations[36] could never be compromised, the Court's decisions in *Fullilove*, *Sheet Metal Workers'*, and *Firefighters* would be eviscerated.

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[36]As an applicant for promotion, Johnson had an expectation of promotion similar to that of any other applicant seeking the job. Johnson cannot demonstrate that he had a right to a promotion based upon his seniority or any other factor. Under its merit system rules, the Agency had the right to pick any of the top seven candidates regardless of whether he or she was the most senior employee or the most qualified.

D. The Agency's Decision to Promote a Well-Qualified Woman to a Position From Which Women had Previously Been Excluded Did Not Violate Petitioner's Title VII Rights.

1. The Selection of Joyce was a Reasonable and Well-Founded Exercise of Remedial Discretion.

The statistical evidence of underrepresentation of women focused attention on the skilled craft and other nonclerical jobs in the Agency's Roads Division.[37] Special consideration of women applicants for these jobs, and no more, is a particularly appropriate method of seeking to remedy the exclusion of women. Moreover, as the Agency Director was aware, charges of sex discrimination had been made against the Agency, including some in reference to skilled craft positions. Tr. 42-43. *See supra*, p. 9.

Graebner, the Agency's Director, had substantial justification to consider Joyce's qualifications equal to those of the Petitioner. Tr. 25, 54, 69, 75.[38] Graebner con-

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[37]The Petitioner and others persist in claiming that the Road Dispatcher job was not a skilled craft job (Pet. Br. 37; U.S. Br. 26-27, n.18). However, no support for that assertion exists in the record or in the decisions of the lower courts. The Road Dispatcher job clearly required knowledge and skills which differentiate it from a clerical job. *See* Tr. 32, J.A. 126-27.

[38]We do not suggest that this Court, in order to affirm the Court of Appeals, must or should determine that the District Court was clearly erroneous in finding that Petitioner was better qualified. Pet. 3a. *See Anderson v. City of Bessemer*, 105 S. Ct. 1504 (1985). Rather, we believe that the District Court applied incorrect legal standards in giving decisive weight to those findings. Under the correct Title VII standards discussed in section A of this Argument, pp. 13-18, *supra*, the evidence shows that the Directors promotion decision was fully consistent with the remedial discretion permitted by Title VII.

sidered them both qualified, and found no significant variation between their interview scores. Tr. 24, 57-58. He evaluated their experience and found it, while different, of equal value. Tr. 75.[39] Both had experience as a road maintenance worker for the Agency and both had experience as a road yard clerk, where both performed Road Dispatcher duties. J.A. 27; Tr. 103, 106.

While the Director ultimately gave decisive consideration to gender, he did so only after considering all the other relevant factors. Graebner testified that while "the opportunity to contribute to meeting our stated affirmative action goals did have an impact" (Tr. 68), he considered a "combination" of factors with an emphasis on their qualifications. Tr. 58-59, 68-69, 70. He also testified that, "if her . . . qualifications [had] been less by a large margin, sex may not have meant anything." Tr. 69. Graebner appropriately exercised his discretion as Director in determining the weight to be given to each factor, including consideration of gender.

The Director had more than sufficient grounds to conclude that the Agency's Plan was properly founded on a need to remedy the effects of its past practice, and that the vacant job in question offered a particularly appropriate occasion for "special consideration." Moreover, the availability of a well-qualified female applicant made the exercise of "special consideration" fully consistent with the Agency's merit system rules in this case. In these circumstances, Joyce's selection was a modest

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[39]The District Court overlooked this evidence in finding that Graebner had only considered their test scores. Pet. 3a, 12a. In fact, the District Court's own qualification finding was based on the examination and interview scores alone. Pet. 12a.

and appropriate first step pursuant to a Plan whose virtue is flexibility and adaptability to specific situations.

If Title VII is read to prohibit the application of the affirmative action plan here, then it is difficult to imagine any circumstances in which the application of affirmative action principles to a particular promotion decision could ever occur. Such a limited reading of Title VII, as Petitioner urges, is wholly at variance with the thrust of this Court's affirmative action holdings since *Weber* and, indeed, of the entire remedial thrust of the statute.

2. Petitioner Failed to Carry His Burden of Proof that the Agency's Action was Unlawful.

The allocation of the burden of proof is well-established in an individual Title VII case alleging disparate treatment. First, the plaintiff must establish a *prima facie* case of discrimination. The employer is then required to articulate legitimate reasons for its action. The plaintiff must then prove that the reasons were a pretext for discrimination or otherwise unlawful. *At all times the plaintiff bears the ultimate burden of proof. McDonnell Douglas v. Green,* 411 U.S. 792, 802-05 (1973); *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 253 (1981).

The allocation of the burden does not change just because the case is brought in a "reverse discrimination" context and involves a challenge to an affirmative action plan. "The ultimate burden remains with the employees

to demonstrate the unconstitutionality of an affirmative action program." *Wygant*, 106 S. Ct. at 1848.

Rather than applying this allocation of the burden of proof, Petitioner and the United States suggest that the burden of proof should be on the *employer*: "[T]he presumption should be that affirmative action is unlawful and the employer should as a matter of policy carry the burden of showing that it is *not unlawful* under these circumstances." Pet. Br. 48; *see also*, U.S. Br. 17. This suggestion finds no support in the decisions of this Court.

The Agency's initial burden in this case was to articulate a substantial evidentiary basis for concluding that remedial action was necessary. This burden was met by the introduction of substantial evidence, both in the form of statistics and testimony concerning Agency practices, from which an inference of discrimination could be drawn. *See* discussion *supra*, pp. 18-25. When the Agency introduced its statistical proof as to the Plan's remedial purpose, it thereby supplied the court with the means for determining that the Agency had a firm basis for concluding that remedial action was appropriate. It was then incumbent upon the Petitioner to prove his case; he continued to bear the ultimate burden of persuading the court that either the Agency's evidence did not support an inference of prior discrimination and thus a remedial purpose, or that the Agency's affirmative action violated Title VII. *See Wygant*, 106 S. Ct. at 1856 (O'Connor, J., concurring).

The Petitioner made no attempt to rebut the Agency's statistics or the evidence of its practices. Indeed, the Petitioner did "not challenge the existence of the affirmative action plan . . . , but simply challenges the way that [it] was used . . ." in this case. Tr. 5. He failed to pre-

sent any evidence that the Agency Plan lacked a remedial purpose.

The Agency's next burden was to show that its affirmative action was was appropriately tailored to the remedial need and not excessively intrusive on the opportunities of third parties. This burden was met by the introduction of the Plan documents and by testimony concerning its flexible, case-by-case method of implementation. Petitioner then had the burden, which he failed to meet, to prove that the Agency Plan violated Title VII.

Having failed utterly to demonstrate that the Agency's Plan was either unfounded or improperly applied, Petitioner has not met his burden of proof, and cannot prevail. Accordingly, the judgment of the Court of Appeals should be affirmed.

Remand should not be necessary since the Agency met its burden to justify its action, to which there was no effective rebuttal. If, however, a remand is ordered, the Court should address the burden of proof issue in order to affirm the Court of Appeals allocation of the burden.[40]

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[40]As the panel held, 770 F.2d 758 & n.4, Pet. 30a n.2, 31a n.4, the District Court erred in placing the burden on the Agency to prove that its plan complied with Title VII. Even the dissent in the Ninth Circuit, 770 F.2d at 762-63 (Wallace, J., concurring in part and dissenting in part), and the United States concede that the District Court did not properly address the factual predicate of the Agency's Plan. U.S. Br. 23. The District Court stated that the Agency had failed to carry a portion of *"its burden"* of proving a history of discrimination, although this was not the critical factor in the District Court decision. Pet. 9a-10a. Instead of deciding whether the Agency had proven its own discrimination, the District Court should have assessed whether the Agency produced a firm factual basis to justify the taking of remedial action. *See* discussion *supra*, pp. 18-25.

II. PETITIONER'S BELATED FOURTEENTH AMENDMENT EQUAL PROTECTION ARGUMENT SHOULD BE REJECTED

A. Since It Was Not Raised Below, the Fourteenth Amendment Argument Should Not Be Considered Here

Petitioner argues here for the first time that the Equal Protection Clause of the Fourteenth Amendment requires the Agency to meet a higher standard of proof than the Court has previously required of an employer who has taken voluntary affirmative action under Title VII. Pet. Br. 19-23; *see also* U.S. Br. 9-10 n.5. This Court should emphatically refuse to address this question.

This is a Title VII case only. The Equal Protection Clause was not mentioned in the Complaint, not argued in the District Court of the Court of Appeals,[41] and not raised in the Petition for Certiorari. It is improper to address an issue which was not raised below and was not comprised within the question presented in the Petition. Supreme Court Rule 21.1(a); *Lake County Estates v. Tahoe Planning Agency*, 440 U.S. 391, 398 (1979); *Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S. 320, 324-25 (1972). A Writ of Certiorari was recently dismissed as improvidently granted because the case turned upon a question not raised below. *EEOC v. Federal Labor Relations Authority*, 106 S. Ct. 1678, 1681 (1986).

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[41]The Ninth Circuit expressly noted that equal protection issues were not raised. Pet. 29a, n.1, *referring to Johnson*, 770 F.2d 752, 754 n.1 (9th Cir. 1985). Both the District Court and the Ninth Circuit analyzed this case as Petitioner presented it below, *i.e.*, solely as a Title VII case governed by *Weber*.

B. Even When Tested Under the Fourteenth Amendment, the Agency's Action Withstands Scrutiny

Although we believe it improper for Petitioner to have raised the Equal Protection issue here for the first time and we are hesitant to address this issue at this time without the guidance of the lower courts, we are *not* reluctant to say that the Petitioner's analysis is both confusing and wrong. The confusion arises from Petitioner's eagerness to avoid what he perceives as a possibly anomalous result that sex reverse discrimination cases might be treated differently than race cases. Pet. Br. 23. If there is such an anomaly, it is not present here. When analyzed under Constitutional standards, the Agency's action withstands scrutiny.

In sex discrimination cases, this Court has not adopted a "strict scrutiny" analysis. Sex classifications have not been viewed as comparable to suspect racial classifications for purposes of equal protection analysis. *Craig v. Boren*, 429 U.S. 190, 210-11 (1976) (Powell, J., concurring); *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724-26 (1982).

At most, the Court subjects sex discrimination cases to an intermediate level of scrutiny, under which the following two questions are asked: First, is there an important governmental objective? Second, does the action taken substantially relate to that objective? *Id.* at p. 725. Here, both questions must be answered in the affirmative.

There was an important governmental objective to be served by the Agency's Plan. Congress's enactment of Title VII establishes beyond question that providing reme-

dies for sex discrimination is an important government objective.[42]

The Agency's action here also satisfies the second prong of the "intermediate scrutiny" test: consideration of underrepresentation of women substantially relates to the objective of remedying sex discrimination, *Bakke*, 438 U.S. 265, 407 (Blackmun, J.). By being sensitive to underrepresentation of women, the Agency can determine whether or not employment and promotion barriers affect particular jobs or a particular division of the Agency. The most effective remedy can be provided by analyzing the prob-

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[42]The purpose of Title VII was "to open employment opportunities for [minorities and women] in occupations which have been traditionally closed to them." *Weber*, 443 U.S. 193, 203 (*citing* 110 Cong. Rec. 6548 (1964) (remarks of Sen. Humphrey). In *Teamsters* the Court also discussed the import of Title VII, "[t]he primary purpose of Title VII was 'to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minorit[ies and women].'" *Teamsters*, 431 U.S. 324, 348 *(quoting McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 800 (1973). *Franks v. Bowman*, 424 U.S. 747 (1976) also emphasizes the important role of Title VII. "[I]n enacting Title VII of the Civil Rights Act of 1964, Congress intended to prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex or national origin [citations omitted] and ordained that its policy of outlawing such discrimination should have the 'highest priority' [citations omitted] . . . . [O]ne of the central purposes of Title VII is 'to make persons whole for injuries suffered on account of unlawful employment discrimination.'" *Id.* at 763 *quoting Albemarle Paper Company v. Moody*, 422 U.S. 405, 418 (1975).

Title VII's call to remedy employment discrimination has elicited responses at the agency and state levels. All of these enactments are evidence of the importance of Title VII's objective. *See* Affirmative Action Appropriate under Title VII of the Civil Rights Act of 1964, As Amended, 29 C.F.R. §§ 1604-1608.12 (1986); Fair Employment and Housing, Cal. Gov't Code §§ 12940-12948. Thus the important objective of voluntary remedial action is encouraged at every level of government.

lem on a case-by-case basis. On limited occasions,[43] the Agency may even consider gender as a positive factor in making an employment decision.

This case would not be decided differently if it were a race case brought under the Fourteenth Amendment. In race discrimination cases subject to "strict scrutiny," the initial burden of showing a compelling governmental purpose for affirmative action is met if the employer produces "a strong basis in evidence for its conclusion that remedial action is necessary." *Wygant*, 106 S. Ct. at 1848. Evidence of an employer's need to remedy discrimination satisfies both "strict" as well as lesser levels of scrutiny:

> The Court is in agreement that, whatever the formulation employed, remedying past or present discrimination by a state actor is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program. This remedial purpose need not be accompanied by contemporaneous findings of actual discrimination to be accepted as legitimate as long as the public actor has a firm basis for believing that remedial action is required.

Wygant, 106 S. Ct. at 1853 (O'Connor, J., concurring).

Thus, in Equal Protection as well as Title VII cases, although the analysis differs, a public employer who wishes to take voluntary affirmative action faces essentially the same initial burden: It must produce a solid factual foundation for its belief that remedial action is necessary.

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[43]The Director testified that he had applied affirmative action considerations "probably half a dozen" times. Tr. 53. "In limited circumstances, a gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened." *Mississippi University for Women*, 458 U.S. at 728.

Statistical evidence showing underrepresentation of women in a substantial portion of the employer's workforce, together with evidence on which to infer exclusionary employment practices, is sufficient to meet this initial burden under both Title VII and the Constitution. A showing sufficient to support an affirmative action plan under Title VII will thereby establish a compelling basis, as required under the Equal Protection Clause, to take remedial action. *See Wygant,* 106 S. Ct. at 1856 (O'Connor, J., concurring).

With evidence sufficient to support a belief that remedial action should be taken, a public employer may, consistent with its constitutional obligations, take affirmative action to provide a "narrowly tailored" remedy. The Agency's action here was perhaps the most narrowly tailored remedy which could be effective in cases such as this. It calls for a *consideration* of gender and no more. "In order to get beyond racism [sexism], we must first take account of race [sex]. There is no other way." *Bakke,* 438 U.S. at 407. (Blackmun, J., concurring).

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

DATED: September 29, 1986

Respectfully submitted,

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No. 85-1129

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

PAUL E. JOHNSON,
Petitioner,
v.
TRANSPORTATION AGENCY,
SANTA CLARA COUNTY CALIFORNIA, and
SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 715,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF RESPONDENT SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 715

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QUESTIONS PRESENTED

May an employer, pursuant to a voluntary affirmative action plan which is agreed to by the union representing the employees involved, consider gender as a factor in the decision to promote a fully qualified woman where women have been historically excluded from the job classification and which plan is flexible with only minimal established goals?

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BRIEF OF RESPONDENT SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 715

The citations to the opinions below and the basis on which this Court's jurisdiction is invoked are set out at p. 1, Petitioner's brief.

STATUTORY PROVISIONS

The relevant statutory provision is 42 U.S.C. Section 2000e-2(a)(1), which reads:

> "It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge

any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."

STATEMENT OF THE CASE

A. The Proceedings Below

Petitioner Paul E. Johnson brought an action based exclusively on Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e *et seq.* (J.A. 5-8). The parties filed a Joint Pretrial Statement, referring only to Title VII. (J.A. 14-19). After a bench trial, the trial court entered Findings of Fact and Conclusions of Law (Pet. 3a-16a), which held that the Transportation Agency violated Title VII because the disputed Affirmative Action Plans were not temporary measures. (Pet. 14a) After the court's findings were issued, Respondent Service Employees International Union Local 715 was permitted to intervene as a defendant for the purpose of arguing the motion for new trial and any appeal. Local 715 is the recognized employee organization for most of Santa Clara County employees including those classifications involved in this case and it sought intervention because of its support for the Affirmative Action Plans which were incorporated into its Memorandum of Understanding with the County (J.A. 146). The trial court denied the motion for new trial.

On appeal, the Ninth Circuit reversed the district court and held, with one judge dissenting, that a fair reading of the Affirmative Action Plans placed them on the permissible side of the rules established in *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), noting that since the Petitioner "did not challenge the affirmative action plan on equal protection grounds [the

court did] . . . not reach the issue." (748 F.2d at n.1).[1] After a petition for rehearing was denied, this Court granted certiorari on July 7, 1986.

B. A Statement of the Facts

1. Diane Joyce was hired in 1970 by the County of Santa Clara into its Office of Education as an Account Clerk, one of the predominately female job classifications within the broader "Office Clerical" category. Two years later, she laterally transferred to the Transportation Agency into the Road Department, maintaining the classification of Account Clerk. (T. 120). She was the first woman to occupy the Account Clerk classification in the Transportation Agency (T. 124). Prior to working for the County, she had extensive experience as a bookkeeper.

In 1974, Ms. Joyce applied for an opening in the Road Dispatcher position. She was deemed ineligible only because of her lack of "experience," which arose out of the circumstances that she had not served in the position of a Road Maintenance Worker. In 1975, Ms. Joyce transferred from the Senior Account Clerk position to a Road Maintenance Worker position, becoming the first woman to fill that position.

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[1] At the outset Petitioner's improper invocation of the Equal Protection clause (Br. 19-23), must be rejected. "[Where a] question . . . was neither argued nor decided in either of the courts below . . . this Court has been hesitant to review questions not addressed below." *University of California Regents v. Bakke*, 438 U.S. 265, 283 (1978). The Solicitor General suggests a more sophisticated analysis relying on the Equal Protection clause. (Br. at n. 5). He suggests that Title VII cannot be read to " 'authorize' unconstitutional behavior." *Id.* The question is not whether Title VII shields Respondent Transportation Agency's conduct, but whether Title VII prohibited the affirmative action undertaken in these circumstances. Finally, the record is insufficient to resolve the Constitutional issue. For, if we apply the strict scrutiny test, it would require a different level of fact finding which no party addressed to the trial court. For example, the Agency might have conceded discrimination against women under a strict scrutiny standard while denying it under a less stringent Title VII analysis.

Paul Johnson followed a similar employment history. Before working for the County, he was a supervisor and dispatcher for a private cement and aggregate concern. He hired on as a Road Yard Clerk in 1967, a clerical position which was downgraded in 1977 as part of a reorganization of the Transportation Department. There is an important significance to this: Contrary to the suggestion in Petitioner's Opening Brief (at 3) and the Solicitor General's Brief (at 29), Paul Johnson's demotion was caused by his voluntary decision, since the combination of his Road Yard Clerk position with that of Account Clerk resulted in a definite cut in salary (T. 127-28). Johnson did express the view that he hoped the demotion would open up promotional opportunities into higher Road Maintenance classifications. (T. 128). It follows, since his previous experience as a supervisor for a private company had qualified him for the Road Dispatcher position once before, his demotion was not intended to "earn" him any subsequent Road Dispatcher position or grant him any greater expectation for it.[2] At the time he transferred to the Maintenance Division as a Road Maintenance Worker, Ms. Joyce had occupied the position for the previous two years.

The Road Dispatcher position, which both Ms. Joyce and Mr. Johnson sought in 1974 and again in 1979, is essentially a clerical position in which the incumbent oc-

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[2] Johnson did nothing between 1974 and 1979 to "earn" the Road Dispatcher position. He was previously qualified by virtue of his experience before he came to the Transportation Agency. On the other hand, Diane Joyce had to obtain four years experience as a Road Maintenance worker in order to qualify for the 1979 opening. Ms. Joyce testified that after she was denied the 1974 promotional opportunity, "I went on the roads and got the experience they wanted." (T. 97 see also T. 107-108) The work itself is unattractive and demanding physically. (T. 108-109). If at all, it was Diane Joyce "who had invested [her] time and effort in a job and often has made great sacrifices with hope and expectation of advancing in [her] job." (Brief of Solicitor General, at 28.)

cupies an office and maintains records and coordinates workers and equipment to the respective job locations (T. 85). Road Maintenance Workers perform the actual physical labor on the roads. Account Clerks and Road Yard Clerks perform clerical functions within the Agency. In 1977, during the reorganization referred to above, the County determined that the Account Clerk position which Diane Joyce had occupied and the Road Yard Clerk position which Paul Johnson had occupied performed substanially equal work and were, therefore, merged into one classification, Account Clerk II (T. 107).

Prior to the promotional opportunity in dispute in this case, both Ms. Joyce and Mr. Johnson worked as Road Maintenance Workers (Mr. Johnson for two years and Ms. Joyce for four years). Both worked out of class performing Road Dispatcher duties for some time before the opening arose and both possessed prior relevant clerical experience: Ms. Joyce in working in the Account Clerk classification and Mr. Johnson working in the Road Yard Clerk classification.

When the Dispatcher position became available in 1979 as a result of the incumbent's retirement, Mr. Johnson and Ms. Joyce applied and were both deemed eligible based upon their experience and qualifications. The Transportation Agency administered an initial oral exam, conducted by two individuals who were not connected with the Transportation Agency. This oral board found seven of the applicants to be eligible and certified them for the position of Road Dispatcher. (J.A. 15). Mr. Johnson scored two more points than Ms. Joyce did in the oral interview, a difference which was deemed irrelevant because all those who scored above 70 were certified as eligible for the position.[3]

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[3] Only the first board "ranked" the applicants by score. The Second Circuit recently noted as to such test scores:

> "Recognizing the fact that small differences between the scores of candidates indicate very little about the candidates' relative

The second interview was conducted by three Transportation Agency supervisors who were familiar with both Ms. Joyce and Mr. Johnson. The panel unanimously recommended Paul Johnson, although for conflicting and contradictory reasons. We know the reasons why two of the members chose Mr. Johnson because they testified in the court trial: Clyde Davis and James Baldanzi.

Clyde Davis was a supervisor to whom Diane Joyce's vigorous union activities were "well known" (T. 167). In his view, "[t]he key factor was Mr. Johnson's previous experience as an Equipment Dispatcher" (T. 174). Mr. Davis felt that Mr. Johnson's "hands-on-experience" with the road equipment, experience which he obtained after 1977, was unimportant.[4] Mr. Davis had also observed Mr. Johnson performing Road Dispatcher work and believed he was doing it well or excellent (T. 177).

James Baldanzi was another Transportation Agency supervisor who held rather strong opinions about Diane Joyce before the interview. He viewed her union activities, which had on occasion involved the assertion of women's rights, as incompatible with the duties of Dispatcher (T. 160). He referred to Ms. Joyce as "a rebel-rousing, skirt-wearing-person" (T. 153). He held decidedly different expectations concerning the behavior of men and women while working for the Agency:

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merit and fitness, we have held that as a means of insuring compliance with Title VII 'the employer can acknowledge his inability to justify rank-ordering and resort to random selection from within either the entire group that achieves a properly determined passing score, or some segment of the passing group shown to be appropriate'." *Kirkland v. New York State Department of Correctional Services*, 711 F.2d 1117, 1133 (2nd Cir. 1983).

[4] Ms. Joyce had been denied the opportunity to apply to the prior promotional opportunity in 1974 because she lacked precisely this experience (T. 96-97).

Q "Did you also, in your deposition, make a comment that, "She's not a lady"?

A That's true. I made that statement.

Q Can you explain what you meant by that statement?

A Well, I've worked with Ms. Joyce in the past in the West Yard, and I have never heard a lady use the type of language that Ms. Joyce uses. And her actions at times, my personal feelings were that she did not act as a lady, as I know a lady to be.

Q Okay.

Let me ask you, when you say type of language, you're talking about rough language?

A I'm talking about, yes, I'm talking about a lot of very vulgar-type profanity.

Q Would you say that that is the language that's used on the roads with some frequency?

A It is amongst men, yes (T. 161:13-162:4).

Contrary to Clyde Davis, he gave the greatest weight to "hands on experience" with the equipment and very little weight with respect to Mr. Johnson's background in dispatching men (T. 150-151).[5]

The interview committee met and unanimously recommended Mr. Johnson. That recommendation was given to Ron Shields, who, in turn, recommended Johnson's appointment to James Graebner. It is here that the Affirmative Action Coordinator of the Transportation Agency interceded. Prior to the second oral interview, Ms. Joyce had contacted the County's Affirmative Action Office when she became suspicious that a supervisor had deliberately scheduled the second interview at the same time as she was required to attend a disaster preparedness class and, because of rumors she had heard, that Mr. Johnson was going to get the job, even before the second interview was held (T. 93-96). This kind of in-

[5] We do not know the views of the third interviewer because he did not testify, Ms. Joyce had had problems with the third person, Glenn Foreman. (T. 82, 91)

tercession or advocacy by an Affirmative Action Officer is one of the important functions of any affirmative action plan. The designated person acts on behalf of minorities or women to resolve problems and act generally as an ombudsman. The County Affirmative Action Coordinator, in turn, contacted Vic Morton, who is the Affirmative Action Coordinator for the Transportation Agency.

Mr. Shield's recommendation was transmitted to James Graebner, Director of the Transportation Agency. Likewise, Mr. Morton's recommendation that Ms. Joyce be promoted was given to Mr. Graebner, who was then faced with a difficult decision. The County's "Rule of 7" is a common personnel practice which is incorporated in the merit system rules in the County of Santa Clara. That rule provides that among the top seven individuals certified as qualified the appointing officer (in this case Mr. Graebner) is free to choose *any one* of seven (T. 19). As a matter of law, the appointing authority's decision to choose an individual from the seven certified as eligible is unreviewable.[6]

When faced with two qualified persons where "there was a difference of opinion between specifically the road operations people and the affirmative action director as to the desirability of certain individuals to be promoted . . ." (T. 171), Graebner chose the woman and, ultimately, it was her sex which was the deciding factor, as the trial court found, a finding which we believe the record supports.[7]

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[6] See p. 30, *infra*.

[7] It is not clear that the district court found Mr. Johnson to be more qualified, contrary to the suggestion of Petitioner. (Br. 8). Rather, the finding was that "[b]ased on the selection process . . . Plaintiff was the most qualified applicant for the position of Road Dispatcher." (Pet. 14a). The three person interview board did recommend Mr. Johnson as the most qualified, but as we have shown, that decision was infected with bias. Ultimately, as a matter

When Diane Joyce was made aware of her selection by Bert Di Basilio, who had been responsible for setting up the interview board and choosing its members, he remarked:

> "Well, you got it through affirmative action even though you were not qualified." (T. 100).

When Ms. Joyce challenged this hostile comment, he recanted and said Ms. Joyce was not "as qualified as Paul Johnson, Dick Jadrick." (T. 100). Jadrick was, of course, not even recommended for the job by departmental management.

When management in the personnel agency prepared the "personnel request and certification" (Trial Exhibit 12, J.A. 26-28), Paul Johnson and Diane Joyce were favorably compared:

> "Paul E. Johnson
>
> > Well-qualified applicant; two years of RMW experience plus 11 years of Road Yard Clerk. Has had previous outside Dispatch experience but was 13 years ago.
>
> * * * *
>
> Diane D. Joyce
>
> > Well qualified by virtue of 18 years of past clerical experience including 3½ years at West Yard plus almost 5 years as a RMW". (J.A. 27).

Mr. Graebner was at time of trial totally satisfied with Ms. Joyce's performance in the Road Dispatcher's position (T. 73).

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of law, it was up to the appointing authority, namely Mr. Graebner, to choose. And he viewed Mr. Johnson and Joyce as equally qualified. (T. 24, 57-58, 69 and 74-75). We submit that it would be an unwarranated intrusion into a personnel decision making process to impose a district court's judgment upon that of the head of the Agency who made the ultimate appointment.

2. The trial court found that the Transportation Agency has not discriminated "against women in regards to employment opportunities in general and promotions in particular." (Pet. 13a). The finding is not surprising in light of the fact that both Petitioner and Respondent Transportation Agency urged the court not to make a finding that any discrimination had occurred. We think the record is contrary both with respect to Diane Joyce as an individual as well as to women in general.

Myra Beals, who was a personnel officer within the Transportation Agency, recounted a specific incident in which a woman was denied training opportunities in the very Road Maintenance Division in which this dispute arose. (T. 230-31). She recounted a specific incident where Ms. Joyce complained because she was a subject of harassment, both verbal as well as physical, from a co-worker and management refused to take any remedial action. The responsible supervisor remarked to Ms. Beals: "Well, if it had been two men, they would have gone outside and fought it out and settled it." (T. 254).

Diane Joyce had been the victim of direct discrimination when she sought the transfer to the Transportation Agency as an Account Clerk:

> Q "Going back again to when you first became employed with the transit district, do you recall, when you were first interviewed for the position of Account Clerk, any comments made by any of the interviewers that suggested to you what they were looking for in that position?
>
> A When I first went over to 1505 Shallenburger to be interviewed by a man named Mr. John Catrin (Ph.), he greeted me, he said, "Good afternoon, Mrs. Joyce. Please be seated."
>
> And I was totally shocked, because the next sentence he said was, 'You know, we wanted a man."
>
> Q When was this comment made?
>
> A Probably in March of 1972.

> He then sent me to West Yard. Then Garcia was General Road Superintendent over there. He didn't even greet me. And as I sat down, he said, "Well, you know we're looking for a man."
>
> I got the job anyway" (T. 110:11-111:2).

In addition to this incident, Ms. Joyce testified that there were a number of specific incidents of discrimination directed against her. Several incidents arose out of her contact with Supervisor Baldanzi, who sat on the interview committee. The first incident involved a circumstance where she was unable to get coveralls for her job, where, "the men ahead of me got coveralls, the man behind me got issued coveralls but there were no coveralls for me. . ." (T. 89). Mr. Baldanzi ignored repeated requests until she finally filed a formal grievance, "and I had four pair of coveralls the next day" (T. 90). Another incident involved the situation where she was warned for lack of a traffic paddle (a hand-held sign for traffic to stop or start) when the men who were working around her were not even warned for similar safety infractions (T. 112-13). There were six other incidents which Ms. Joyce recollected but was not asked to describe in detail (T. 119).

The Transportation Agency itself has been the subject of charges of specific acts of discrimination and "across the board" complaints (T. 43-44). Indeed, since the promotion involved, there has been one judgment and a consent decree entered against the County arising out of similar questions of promotion and discrimination against women.[8]

We have also noted above the structural discrimination of the promotional system towards Road Dispatcher. It is a clerical position which is part of the promotional series from Road Maintenance Worker, a manual labor classification which has been exclusively occupied by men until Diane Joyce moved into the classification in 1975.

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[8] See brief of Respondent, Transportation Agency, n. 5.

Yet, historically, clerical positions have been predominately female. On the other hand, the Dispatcher position is the kind of promotional opportunity which has been reserved exclusively for men coming out of the ranks of Road Maintenance Worker. In contrast, Paul Johnson began work as a Road Yard Clerk, a position which was in 1977 reclassified into the Account Clerk II classification. The Road Yard Clerk was a male position and it was not until Diane Joyce's Senior Account Clerk position and Paul Johnson's Road Yard Clerk position were merged into the Account Clerk II classification that any woman occupied that position. In summary, women have been historically excluded from the dispatching-type position because of its arguable misclassification as a skilled-worker classification which had been historically filled by men where women had historically filled clerical positions.

These incidents of discriminatory conduct and structural discrimination were buttressed by the statistical data which was undisputed by any party. Of the 238 employees in skilled craft positions, including Road Dispatcher, none was a woman until Diane Joyce received this promotion. Likewise, Diane Joyce was the first woman to occupy a Road Maintenance Worker classification. In clerical positions in the Transportation Agency, 75.9 percent were women (T. 44). The County's "long range goal" was to equal the ratio of women "[i]n the area work force as indicated in the 1970 Census," (J.A. 54), which figure was 36.4 percent.[9] In contrast, the

[9] There is some force to the point made by the Solicitor General (Br. p. 24, n. 13) that applicant flow data (the number of women applying or seeking jobs) would be a more relevant indicator of the discrimination, if any, of the Transportation Agency. Likewise, evidence of futility, that women did not even apply because of discriminatory reputation would be relevant, *Local 28 of the Sheet Metal Workers International Association v. Equal Employment Opportunity Commission*, 478 U.S. ——, 92 L.Ed. 2d 344, 371 (1986). This Court cannot reach this debate since Petitioner did

statistics contained in the Affirmative Action Plan demonstrated far more women in other traditional male classifications as a result of an aggressive recruiting and hiring campaign (J.A. 49-50).

3. There are two Affirmative Action Plans. The County's Affirmative Action Plan was adopted October 16, 1979 (J.A. 11-131). The Affirmative Action Plan applicable to the Transportation Agency was adopted effective December 18, 1978 (J.A. 29-110). Neither plan had an ending date and neither plan contained any quotas whatsoever. Rather, each repeatedly used the word "attained" and its synonyms to describe the goals which were established with respect to the ethnic and sexual makeup of the work force. Nowhere is the word "maintained" or any synonym found in the 102 pages of text contained in the Joint Appendix. For example, the prefix states that "(t)he Transportation Agency goal is to attain an Agency work force whose compensation reflects the ethnic and sexual makeup of the area work force." (J.A. 34). Although the long range goal was "to attain a work force whose composition in all job levels and major job classifications approximates the distribution of women . . . in the Santa Clara County work force" (J.A. 54), short range employment goals were to be established (J.A. 61). The County recognized that it would be "extremely difficult to significantly increase the representation of women in technical and skilled craft job classifications where they have traditionally been underrepresented." (J.A. 58).

At the time of the promotional opportunity, no yearly goals had yet been established within the overall goals and, when those goals were established for the skilled

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"not challenge existence of the Affirmative Action Plan, this one in particular, or Affirmative Action Plans in general . . ." (T. 5). See also J.A. 17. No statistical evidence was offered by Petitioner to challenge either the evidence of gender composition of the Transportation Agency's work force nor the significance of those statistics.

craft classification, they were minimal and innocuous. The 1982 plan anticipated 55 openings and established a goal of placing only three women in those openings (J.A. 143). Assuming the plan remained at the same level, the number of women in skilled craft jobs would never exceed the same ratio of less than six percent of the classification. An argument could be made that such a minimal goal would perpetuate the unlawful underrepresentation since it would effectively set a maximum of six percent women in the skilled craft category. Thus, the lack of an ending date reflected the fact that it was unlikely that even this most minimal goal of placing women in skilled craft positions would ever come close to achieving anything near to parity with County-wide work force statistics of women in the work force.

The lack of ending dates is not surprising nor prejudicial since it was intended that goals would become irrelevant once they had been achieved and the plan, insofar as those classifications are concerned, would no longer be effective. Thus, the plans recognized those categories where parity or overrepresentation had been achieved (S.E.R. 209).

Fairly read, the plans recognized that there had been past County actions hindering the development of a representative County work force and emphasized that affirmative action "must be taken to remedy the effects of past practices in order to develop County work force whose make-up reflects the composition of the Santa Clara County community." (J.A. 112-113).

THE SUGGESTION OF A QUESTION OF MOOTNESS

We believe that the Court should be fully advised of those facts suggesting mootness of this dispute. *Fusari v. Steinberg*, 419 U.S. 379 (1975). Paul Johnson has now retired permanently from the County. The district court entered a judgment requiring that the County pay

$5,654.48, "representing all forms of compensation and benefits which plaintiff has not received as a result of his not being appointed to the position of Road Dispatcher in June, 1980. . ." (Pet. 1a). The judgment also required plaintiff be paid reasonable attorneys' fees. It is our understanding that the damages as well as the attorneys' fees have been paid by the County to Mr. Johnson and his attorney, respectively. We understand that Petitioner now claims some additional contributions must be made to the Public Employee Retirement System of the State of California. (Pet. Reply, 3). The judgment quoted above forecloses any request for further benefit payments.

In this light, the case may well be moot unless the County takes an affirmative position that it will demand reimbursement from Mr. Johnson of the monies paid to him or from his attorney for the fee award. We do not understand that the County has taken a specific position in that regard. Only if the County seeks reimbursement would mootness be avoided.[10]

ARGUMENT

I. INTRODUCTION AND SUMMARY.

In contrast to various *amici* and the Petitioner, who have discussed broad constitutional and statutory issues, we focus upon the compelling factual realities of this case in light of the principles of *Weber* and the subsequent cases which have considered the problems of remedying employment discrimination. We do so because the Transportation Agency's promotion of Diane Joyce proves the continuing validity of the *Weber* concepts and formulation that each affirmative action plan and its application must be judged in light of the particular

[10] The Transportation Agency's Brief notes this issue but does not state a position as to whether reimbursement will be sought. (Br. n. 7).

circumstances which generate it and under which it operates.

There are two themes which *Weber* generates and which are woven into the subsequent cases. First, the factual predicate for the affirmative action must be developed and that predicate need not be proven or agreed-upon discrimination. Second, the burden or disability, if any, upon those who are not in the protected group must be measured for its intrusiveness. As we shall show, there was a compelling factual predicate for the application of County's Affirmative Action Plans in this case and the plans themselves imposed no unnecessary burdens upon those who were not the subject of the plans' benefits.

The factual predicate for the Affirmative Action Plans, as applied in this case, falls into three related categories: (1) The manifest gender imbalance in the Transportation Agency's skilled work force, (2) The uncontradicted incidents of discrimination and harassment through which Diane Joyce and others in the County suffered, and (3) The structural barriers against women obtaining the promotion to the Road Dispatcher position, even though it was a clerical position similar to those which were elsewhere traditionally filled by women. When these facts are viewed together, had Paul Johnson been mechanically chosen for the promotion, Diane Joyce and Local 715 would have had various legal remedies against the Transportation Agency. The success of such action, whether by Title VII litigation or through the grievance procedure, would have been made easier because of the contradictory reasons given by members of the second interview panel as to why Paul Johnson was recommended over Diane Joyce. Applying the burdens of proof as established in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), Ms. Joyce and Local 715 would have easily presented a *prima facie* case, particularly in light of the characterization of

Ms. Joyce as a "rebel-rousing, skirt-wearing person" by one member of the interview committee. Whatever defense the County would have presented, it would have been pretextual in light of the contradictory reasons for the recommendation when compared to the County's own rating sheet which described them as indistinguishable (J.A. 27-28).

These circumstances prove the validity of the *Weber* formulation that employer or union need not prove discrimination in order to justify some affirmative action, particularly where it may be tested against job classifications which are traditionally segregated; and it is not challenged by any party that women have suffered from unlawful disabilities in such skilled craft positions.

The second theme addresses the burden, if any, imposed upon the complaining party. As we shall show, Diane Joyce's promotion imposed no disability upon Paul Johnson and the level of intrusiveness in this promotion setting is minimal. Under California law, Paul Johnson had no more than a hope of promotion; no more than the six others who were certified as eligible. He shared the same entitlement to the promotion, an entitlement which meant nothing more than that the Agency had the obligation to consider him. Under the "Rule of Seven," a rule which is commonly used under Merit System rules for public agencies, the appointing official has unreviewable discretion to promote whomever he or she wants without regard to comparative qualifications from those seven deemed eligible. No seniority right, nor right by virtue of qualifications, experience or score in the interview was given to Paul Johnson or Diane Joyce. Thus, the promotion of Diane Joyce intruded, at most, upon Paul Johnson's hope of promotion; he lost nothing and was only disappointed to the same extent as the five others who were deemed eligible and also lost out. Finally, where the Union which represents the employees involved has agreed to the affirmative action, it has rea-

sonably accommodated the competing interests of its members lending additional validity to the plans.

Having established these points, we address finally the arguments of Petitioner that the plans trammeled upon his rights and the plans were invalid because they were not temporary. Since Mr. Johnson had no entitlement to the promotion, we need only consider his contention with respect to the lack of a termination date on the plans. We think the court below fairly read the plans as being designed to be temporary remedial measures, particularly when viewed in light of this instance of promotion of the first woman into the skilled craft positions in the Transportation Agency. Since the *Weber* formulation explaining that such Affirmative Action Plans must be "temporary" arose out of the context of assuring that the plan was remedial, that test is easily met where the promotion was generated by an innocuous and conservative goal of filling less than six percent of the positions with women.

II. EVEN WITHOUT A FINDING OF DISCRIMINATION, THERE WAS A COMPELLING FACTUAL PREDICATE WHICH JUSTIFIES DIANE JOYCE'S PROMOTION UNDER THE AFFIRMATIVE ACTION PLANS.

Had James Graebner mechanically accepted the recommendation of the second interview committee to promote Paul Johnson, Local 715 and Diane Joyce would have had forceful legal remedies to challenge such a decision. Other than federal remedies under Title VII and the Equal Protection Clause,[11] a grievance under the Memo-

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[11] Where, as the Solicitor General correctly points out, the Agency's promotion of Mr. Johnson would have been subject to the "strict scrutiny" test (Br. p. 9), there is a certain compelling irony here. Had there been no Affirmative Action Plan, Diane Joyce would have had the benefit of the "strict scrutiny" test under the Equal Protection clause or Title VII in attacking the Johnson promotion. The position of Petitioner and the Solicitor General

randum of Understanding which incorporated the Affirmative Action Plan (J.A. 146) could have been initiated or the California statutory remedies could have been invoked.[12] The same predicate for the Affirmative Action Plans would have been the Union's or Diane Joyce's case. Contrary to the suggestion of Petitioner, it would not have rested solely upon statistical evidence (Pet. Br. 24-25), as we have shown in our Statement of the Facts. We are, however, prepared to show that the statistical evidence in the record was sufficient to validate the Affirmative Action Plans. In doing so, a quick comparison to *Weber* is instructive. In *Weber*, the employer recognized that as to its own skilled craft positions there was a manifest statistical imbalance; namely, only 5 out of 273 of the skilled craft workers had been black. In comparison to this case, none of the 238 skilled craft workers was a woman *and* Mr. Johnson sought promotion to a clerical type position within the skilled craft group where similar clerical dispatcher positions had been historically filled by women (See T. 7, 32-33; S. E. R. 202). That manifest statistical imbalance is sufficient to guarantee that any affirmative action is not unrelated to some past conduct by the employer which had the effect, direct or indirect, of discouraging or excluding women from those positions. Because Petitioner did not challenge the relevance or competence of those statistics nor attempt to rebut them with his own statistical evidence, they stand uncontradicted.

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imposes a higher burden upon the Respondent County to justify her promotion when the Affirmative Action Plan is invoked. Thus, any woman would be better off from a litigation posture in not asserting the application of Affirmative Action Plans but in asserting the "strict scrutiny" test. We think such a result is the kind of anomaly which this Court recognized in encouraging Affirmative Action Plans which are voluntarily adopted.

[12] California Government Code Sections 12940-12948.

This Court's decision in *Hazelwood School District v. United States*, 433 U.S. 299 (1977), gives sufficiently clear guidance to demonstrate that the statistical imbalance was more than adequate to establish at least a *prima facie* case of discrimination on the part of the Transportation Agency; for "[w]here gross statistical disparities can be shown, they alone may in a proper case constitute *prima facie* proof of a pattern or practice of discrimination." *Id.* at 307-308. In *Teamsters v. United States*, 431 U.S. 324, n. 20 (1976), this Court stated:

> Statistics showing [gender] imbalance are appropriate in a case such as this one only because such imbalance is often a telltell sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatorily hiring practices will in time result in a work force more or less representative of the [gender] composition of a population in a community from which employees are hired." *Teamsters v. United States*, 431 U.S. 324, n. 20 (1976).

Having established at least a *prima facie* case of discrimination against Diane Joyce and women in general in the Transportation Agency, we turn to that circumstance which offers a further guarantee that such voluntary plans arise out of a substantial factual predicate generated by the employer's conduct. In *Weber*, this Court recognized that the job categories were "traditionally segregated." *Id.* at 209. We submit that the same circumstances exist with respect to skilled craft positions insofar as women have been denied hiring, training and promotion. It is sufficiently accepted for it to be a "proper subject for judicial notice." *Id.* at n. 1. Some of those same types of authorites are noted in the margin.[13] *Weber* established an important parameter

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[13] See, Brief of Lawyers Coordinating Committee Amicus Curiae, p. ——.

with respect of voluntary Affirmative Action Plans. They must relate to employment practices in job categories where there is a history and tradition of job discrimination. This is an important validation of affirmative action, which surely exists in this case.[14]

In summary, this record amply demonstrates why there is no reason to disturb the *Weber* teaching, which permits a voluntary Affirmative Action Plan "designed to eliminate conspicuous [gender] imbalance in traditionally segregated job categories," *Weber*, at 209.

Our inquiry is, of course, not completed, for the plan under attack must satisfy certain design features which further guarantee its remedial nature. We deal with those questions, particularly to the extent to which it trammels upon Paul Johnson's rights, *infra*. Before doing so, we canvass this Court's decisions since *Weber* to show that there has been no retreat from the proposition that there are two underlying themes which sustain affirmative action: (1) Assurance of sufficient factual predicate, and (2) Assurance that the rights of non-protected groups not be unnecessarily trammeled upon.

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[14] We are not asking that this Court overturn the trial court's finding that the Transportation Agency had not engaged in discrimination (Pet. 13a). The finding was of no moment since neither the Petitioner nor Respondent Transportation Agency asked the trial court to make either specific findings relating to Diane Joyce or general findings relating to the Agency's employment practices. Nor does the finding suggest that an unrebutted *prima facie* does not exist; only that no party asked that the trial court make an ultimate finding on that issue. Since it was not "litigated," it is a finding which is of little moment to challenge the Affirmative Action Plans.

III. SINCE WEBER, THIS COURT HAS MAINTAINED THE THEME THAT REMEDIAL RELIEF IS NOT PROHIBITED BY THE PRECEPTS ESTABLISHED BY TITLE VII EVEN IN THE ABSENCE OF A FINDING THAT THE EMPLOYER HAS DISCRIMINATED.

It is easier to justify affirmative action under the circumstances of this case than those arising in *Weber*. In *Weber*, Kaiser and the Steelworkers Union established a training program where "[s]election of craft trainees was made on the basis of seniority, with a proviso that at least 50% of the new trainees were to be black. . ." 443 U.S. at 199. Thus, white and black incumbent workers were entitled to assert their seniority rights for training for skilled craft positions. And this Court has repeatedly recognized that "[s]eniority systems and the entitlements conferred by credits earned thereunder are vast and increasingly important in the economic employment system of this Nation." *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 766 (1976). Second, the *Weber* training program established a strict numerical quota requiring that at least half of the admitees to the program were to be Black. Like this case, however, those who were foreclosed from the training program suffered no disability, but only their expectation of receiving craft training was possibly delayed, as Mr. Johnson's expectation of being promoted was possibly delayed.

The *Weber* plan was not built upon the foundation of any past finding of discrimination on the part of Kaiser or the Steelworkers Union, but only upon the unchallenged recognition that race had traditionally been a factor in excluding individuals from skilled crafts. *Weber*, 443 U.S. at n.1. That women have been historically excluded from skilled craft positions is also unassailable.[15]

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[15] In contrast, five out of 273 skilled craft workers at the plant involved were black, where none of the 238 skilled workers were women in the Transportation Agency prior to Diane Joyce's promotion.

Before commencing our analysis, we must divert our attention to two questions raised as to the applicability of *Weber* to public employers and to gender-conscious plans.[16] In *Weber*, this Court expressly declined to rule as to whether its principle is applicable to public employers. To be sure, in 1972 Congress amended the Civil Rights Act to bring within its sweep public employers and there is no suggestion in the statute or legislative history that Congress intended any different principles to apply under Title VII to public employers or private employers. And this Court has never applied a distinction between such employers when considering Title VII issues affecting public entities. *Connecticut v. Teal*, 457 U.S. 440 (1982); and *Bazemore v. Friday*, 478 U.S. ——, 92 L.Ed.2d 315 (1986). Nor do we understand Petitioner or any *amici* to argue that there are different statutory tests depending upon the nature of the employer involved.

Second, for purposes of the prohibited forms of discrimination contained in Section 2000-2(a), no distinctions are made between sex, race, or other specified categories. Nor do we understand Petitioner or any *amici* to suggest that there is any different statutory standard. This Court has treated the concepts as interchangeable. *Bazemore v. Friday, supra.* We, thus, approach the issues raised by *Weber* upon the accepted foundation that those principles applicable in race cases are equally applicable in gender cases under Title VII.

Before going forward, a brief comment "backward" is appropriate, for the Solicitor General invites this Court to resolve any ambiguities created by *Weber* by reviewing earlier decisions and, thus, limits *Weber*'s reach. (Br. 13). *Regents of the University of California v. Bakke, supra,* gives no comfort to this position. First, it is not a Title VII case concerning the purposes behind a statute enacted by Congress to deal with employment discrim-

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[16] The Solicitor General expresses the same view. (Br. n. 5).

ination. Second, the stated purpose of the University in adopting the special admissions program related to the interests of the medical school as well as general societal interests, contrary to this case where affirmative action plans related only to employment within the Transportation Agency. Third, the medical school had only been open for three years when the faculty adopted the special admissions program without any empirical basis related to the operation of the medical school. Finally, the special admissions program reserved positions to "disadvantaged" applicants. Here, no promotional position or hiring decision was reserved for women. We recognize, however, that *Bakke* contains this Court's first full-blown attempts to deal with "reverse discrimination." We think that this Court's later and more narrowly focused views in *Weber* and its employment discrimination progeny are more instructive.

The first such case is *Firefighters v. Stotts* 407 U.S. 561 (1984). The majority rejected the view that the trial court could modify a seniority system as part of the trial court's continuing supervision over a consent decree which did not modify that seniority system. We accept that view since nothing in this case reaches any similarly recognized interest or rights in which Paul Johnson had any legally cognizable claim. And, although Section 706(h) protects seniority systems, this Court has emphasized that the courts should not generally scrutinize decisions of public employers which relate to discipline or promotion and which are left to those generally appointed to make such decisions. Indeed, the Constitution "is not a guarantee against incorrect or ill-advised personnel decisions," *Bishop v. Wood*, 426 U.S. 341 (1976). Title VII reflects the congressional concern that management discretion with respect to hiring decisions not be disturbed. *Local No. 93, Firefighters v. City of Cleveland*, 478 U.S. ——, 92 L.Ed. 2d 405, 422 n. 10 (1986). The majority's opinion then points the way to the theme which we believe is

extracted from these cases of determining whether any right is implicated by the action of a governmental agency under an Affirmative Action Plan. Since there was no such right implicated in this case, *Stotts* requires us to move on to the three cases decided last term.

Wygant v. Jackson Board of Education, 476 U.S. ——, 90 L.Ed. 2d 260 (1986), focused once again upon layoffs in the face of a collective bargaining agreement, providing that such layoffs were to be governed by seniority. In rejecting the Affirmative Action Plan, Justice Powell emphasized for the Court the impact upon the "innocent" individuals:

> "In cases involving valid *hiring* goals, the burden to be borne by innocent individuals is diffused to a considerable extent among society generally. Though hiring goals may burden some innocent individuals, they simply do not impose the same kind of injury that layoffs impose. Denial of a future employment opportunity is not as intrusive as loss of an existing job." 90 L.Ed. 2d at 274.

We submit that Mr. Johnson's loss of this promotional opportunity posed an even less intrusive effect than if he had been denied hiring under a valid plan. One who is denied hiring may be left unemployed and without career opportunity in a major public employer. Paul Johnson remained employed with the opportunity to seek further promotions in Road Dispatcher positions or other positions. Measured against the "burden" or intrusiveness" standard, the Transportation Agency's actions are sufficiently narrowly tailored.

When discussing the second theme of the predicate for an affirmative action plan, the majority did not reach the issue, but pointed the way to a test which is entirely consistent with *Weber*. Specifically, Justice Powell wrote:

> "Evidentiary support for the conclusion that remedial action is warranted becomes crucial when the

> remedial program is challenged in court by nonminority employees. * * * In such a case, the trial court must make a factual determination that the employer had a strong basis in evidence for its conclusion that remedial action is necessary." 90 L.Ed. 2d at 271.

This is no different from the "conspicuous" or "manifest" statistical imbalance relied upon by this Court in *Weber* nor the "arguable violation" approach of Justice Blackmun in concurring in *Weber*.

These themes recur in *Local 28, Sheet Metal Workers International Association v. Equal Employment Opportunity Commission*, 478 U.S. ——, 92 L.Ed. 2d 344 (1986). In rejecting the constitutional challenge to the seniority relief, the majority noted that the lower court's orders will have only a marginal impact upon the interest of white workers. Justice Powell concurred, especially noting, "it does not appear that nonminorities will be burdened directly, if at all." Justices O'Connor and White rejected the lower court's order because they viewed it as ultimately requiring the replacement of current journeymen with apprentices on a racial basis. Needless to say, *Local 28* does not address the question of the predicate for such affirmative relief since there had been judicial findings of discrimination by Local 28. Whether the words "egregious," "contemptuous" or "pervasive" are accurate, their pejorative tone emphasizes that in voluntary affirmative action situations one will not expect the employer or the union to concede the discriminatory conduct. Indeed, such words are redundant since all discrimination is rejected by this Court in the strongest terms.

Finally, *Local No. 93, Firefighters v. City of Cleveland*, 478 U.S. ——, 92 L.Ed. 2d 405 (1986) involves the interpretation of Section 706(g), 42 U.S.C. Section 2000e-5 (g). In this case, this Court once again emphasized the importance of voluntary affirmative action and, therefore, found Section 706(g) inapplicable to a consent decree:

"It is equally clear that the voluntary action available to employers and unions seeking to eradicate [gender] discrimination may include [gender]-conscious relief that benefits individuals who were not actual victims of discrimination." 92 L.Ed. at 419.

We submit that *Stotts*, *Wygant*, *Local 28* and *Firefighters* have all validated the *Weber* concept, leaving "to another day the task of 'defin[ing] in detail the line of demarcation between permissible and impermissible affirmative action plans.'" *Firefighters*, *supra*, 92 L.Ed. 2d at 420, quoting from *Weber*. In the next section of this brief we shall confront the line of demarcation and demonstrate that the Affirmative Action Plans do not unnecessarily trammel upon Paul Johnson's interests.

IV. WEBER REQUIRES THAT AFFIRMATIVE ACTION PLANS BE TAILORED TO A NARROW REMEDIAL PURPOSE SO AS TO NOT UNNECESSARILY TRAMMEL UPON THE INTERESTS OF WORKERS WHO ARE NOT THE DIRECT BENEFICIARIES; THAT PURPOSE IS MET IN THIS CASE.

Once the predicate for the Affirmative Action Plan is established, *Weber* forces us to focus upon the narrowness of the remedy of the plan so as to protect the interests of those employees who are not the direct beneficiaries of the plan, although all employees are indirectly the beneficiaries of affirmative action efforts. Although *Weber* does not call for a balancing test between the extent of discrimination and the breadth of the remedy, that is necessarily implied in the process of fashioning any equitable relief. This Court recently reemphasized that the language of Title VII "plainly expresses Congress's intent to vest district courts with broad discretion to award 'appropriate' equitable relief to remedy unlawful discrimination." *Local 28*, 92 L.Ed. 2d at 369. Certainly a voluntarily adopted plan must take into account the extent of discrimination and the intrusiveness

upon the employees. In fashioning an Affirmative Action Plan, we cannot ignore the important role which the Union, Local 715, played in this process. The Union supported the Affirmative Action Plans and incorporated them into its Memorandum of Understanding which is enforceable under California law.[17] Under California law, public agencies have a duty to meet and confer with a recognized employee organization which is the analog of bargaining in good faith under the National Labor Relations Act. California Government Code § 3505 and 29 U.S.C. § 158(a)(5). Hence, Local 715 is in the position of having agreed to the "County Affirmative Action goals and timetables as adopted by the Board of Supervisors." (J.A. 146). And more by its vigorous participation in this case in the court below and this Court, it is an advocate on behalf of its membership for such goals. And the advocacy extends to the 238 men who were in the Transportation Department in the skilled craft classification who were part of the bargaining unit represented by the Union. Thus, as far as the record shows, it is only Paul Johnson out of the entire membership who has objected to the Affirmative Action Plan.

In the context of collective bargaining, this Court has acknowledged that:

> "Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make it invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953).

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[17] *Glendale City Employees' Association v. City of Glendale*, 15 Cal. 3d 328 (1975).

Even in allocating seniority which will lead inevitably to layoffs, unions may adjust seniority as long as the union's conduct does not violate its duty of fair representation. *Humphrey v. Moore*, 375 U.S. 335 (1964). See also, *Vaca v. Sipes*, 386 U.S. 171 (1967).

Of course, if the decision by the Union is based on racial or sex discrimination it is a violation of the union's duty of fair representation. *Brotherhood of Railroad Trainmen v. Howard*, 343 U.S. 768 (1952). And, this Court has recognized that "[t]he elimination of discrimination and its vestiges is an appropriate subject of bargaining, and an employer may have no objection to incorporating into a collective bargaining agreement the substance of his obligation not to discriminate . . ." *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 69 (1975). We think it is a forceful component of validating any affirmative action plan that the Union which represents the employees supports such goals and timetables, for effectively such bargaining is a legitimate [18] means of accommodating the competing interests of all employees:

> "The Court has also held that a collective bargaining agreement may . . . enhanc[e] the seniority status of certain employees for purposes of furthering public policy interests beyond what is required by statute, even though this will to some extent be detrimental to the expectations acquired by other employees under the previous seniority agreement [citation]. And the ability of the union and the employer voluntarily modify the seniority system to the end of ameliorating the effects of past racial discrimination, a national policy objective of the 'highest priority' is cer-

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[18] We do not suggest that this proposition can be accepted where the Union itself is shown to be discriminatorily administered, nor are all individual rights of Title VII subsumed by the bargaining agents agreement with an employer.

tainly no less than in other areas of public policy interests." *Franks v. Bowman Transportation Co., supra*, 424 U.S. at 778-79. (union agreed with retroactive seniority).

It should not be forgotten that *Weber* arises in the context of an affirmative action plan worked out through collective bargaining between the union and the employer. The parties there were able to develop a satisfactory plan which did not unnecessarily trammel the interests of nonminority workers. We think because evaluation of the County's plans will demonstrate such a minimal impact, the same is true precisely because the union involved, Local 715 agreed to the plan and thus effectively protected the interests of nonminority workers. We now turn more specifically to the three factors discussed in *Weber* in validating any plan, 443 U.S. at 192.

In viewing this issue we must repeat that Johnson had no right nor legally cognizable interest in the promotion. Under California law, he may not challenge the appointing authority's decision as to whom to select among those who are qualified; he may only mount a legal challenge if he is ruled "unqualified" because of a faulty testing procedure.[19]

First, the plan cannot require the discharge of current workers and their replacement with the beneficiaries of the plan. Of course, nothing approaching that happened here. On the other hand, the force of this Court's statement is muted by those cases which grant retroactive

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[19] *Almassy v. Los Angeles County Civil Service Commission*, 34 Cal.2d 387 (1949) and *Wilson v. Ostly*, 173 Cal. App. 2d 78 (1959). New York law, for example, is the same. *Kirkland v. New York State Department of Correctional Services, supra*, 711 F.2d *at* 1134. No due process rights are triggered under either the State or Federal constitution where promotions are denied. *Fuchs v. Los Angeles County Civil Service Commission*, 34 Cal. App. 3d 709 (1973); and *Schultz v. Regents of the University of California*, 160 Cal. App. 3d 768 (1984).

seniority to actual victims of discrimination. *Teamsters*, and *Franks v. Bowman Transportation Co.*, *supra*, 424 U.S. at 779. Although limiting such relief only to actual victims, necessarily the reinstatement and retroactive seniority compels certain junior employees to be laid off when the actual victims are instated to their positions.

Second, the plan cannot constitute an absolute bar to the non-beneficiaries of the plan. In *Weber*, half of the training positions were open to whites based on seniority. Over time, not all whites would necessarily be able to assert their seniority to participate. Here, no bar to any advancement was made. Johnson remained eligible for any further advancement to higher levels of Road Maintenance Worker [20] or Road Dispatcher.

Petitioner did not offer any evidence to prove that there would not be further promotional opportunities available to him, although we know that there were only a few Road Dispatcher positions, making it unlikely in the near future that another promotion to that position would arise quickly. The 1982 plan contemplated 55 openings in skilled craft positions, although we do not know how many would be promotional. The 1981 figure shows four promotional positions open in skilled craft positions. (J.A. 144). Johnson has not met his burden of showing that he was foreclosed for any substantial amount of time from procuring a promotion in the Transportation Agency.

Third, in assuring that the plan "is not intended to maintain [gender] balance, but to eliminate a manifest [gender] imbalance . . . ," (*Id.* at 208), the Court noted but did not require that a plan be temporary. In the

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[20] When Johnson took the demotion because his salary was cut when the Transportation Agency was reorganized in 1977, he hoped that it would open additional promotional opportunities to him. He must have had in mind promotion to Road Maintenance Worker III and IV, not Road Disptacher since he was already qualified for any Road Dispatcher position. See p. 4, *supra*.

Weber case, the quota was to expire when the relevant percentages were met. Thus, this Court did not say that affirmative action may not end, only that it could not have the improper purpose of maintaining a race or gender balance. Here, we need not even reach the question of when the plan would have the effect of maintaining rather than attaining because the promotion of Diane Joyce to a skilled craft position, "increasing" the percentage of women incumbents from zero percent to less than one half of one percent, can hardly have the effect of maintaining anything other than the gender imbalance. That is, from the point of view of remedy, it was such a "small dent", (T. 64) to use Mr. Graebner's words, that it probably did as much to preserve the imbalance as remedy it.

As we have noted above, the promotional opportunity came just after the plans were adopted but before short term goals were established. Nothing in the plans suggest that they would continue in any classification or category once goals were met. And the Solicitor has expressly noted that in certain categories partity was met without any suggestion that affirmative action by way of choosing beneficiaries of the plan would continue as to those classifications (Br. 27, n. 19). Nothing in any prior opinion of this Court suggests that a public agency may not continue the recruitment, monitoring and other aspects of Affirmative Action Plans on a permanent basis. Ironically, if the County only targeted 3 skilled craft positions to be filled by women out of 55 available skilled craft positions one could argue that once that percentage was reached (six percent of 238), then any further application of goals would be "maintenance." [21] This would

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[21] This invites this Court to avoid the question of when the apparent permanence of a plan might violate the remedial requirement of *Weber*. Here, there is no evidence that the disputed plans have been applied to anyone other than Diane Joyce. From the discussion above it is clear that the time when gender balance may be achieved is many years ahead, and at that point the preferential

not occur until at least five years of operation of the short term goal.

The court below fairly read the plan as not operating for the purpose of maintaining a gender balance. Although Petitioner presses the argument that the court's reading of the plan violates the clearly erroneous rule, that argument is flawed since all that the court below did was read the document, which review does not implicate the clearly erroneous rule.[22] But, this Court's opinion in *Weber* teaches that we do not focus upon whether there is an ending date, but the ultimate purpose of the plan. And the trial court's mechanical application of the "ending date" concept to invalidate the plan because it was an evolving document without a specific end date is not tuned to the purpose of noting (but not holding) that the valid *Weber* plan was temporary.[23]

Where the Transportation Agency has taken such a small step forward, it is unfair to criticize it for not being able to predict when some reasonable level of women in the work force would be achieved. The argument of the Solicitor General that "the apparent permanence", Br. at 27, renders the plan lacking in the ap-

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promotion of a woman might cross the line between remedial of an imbalance to maintenance of a balance.

[22] 5A, *Moore's Federal Practice* 2d. ed., para. 52.04.

[23] In the context of collective bargaining in the private sector, collective bargaining agreements are always temporary for many reasons. Here, we are dealing with a County-wide plan adopted though a legislative process as well as agency and departmental plans. Under this process, the Agency or County could modify or change the plan at will, something which cannot be done under a negotiated plan for a specific period of time. This argument holds true even though the Affirmative Action Plan was incorporated into the Memorandum of Understanding with Local 715. Nothing in the record suggests that the plan was coterminous with the ending dates of the Memorandum, although the Union's ability to enforce the plan as part of the Memorandum would expire during any hiatus between an old and new plan.

propriate remedial interest, improperly faults a public employer who adopts the most minimal of goals (six percent goal), and who is, thereby, unable to state when the statistical imbalance will be remedied. Indeed, the fallacy of the argument comes from the Solicitor General's brief when he notes that "a 50% female quota would not enable Respondent to meet its goal for fifteen years." Br. at 28, n. 19. In choosing, between excessive goals with a statistically predictable date for achievement of some gender balance; and, on the other hand, minimal and innocuous goals without a predictable date for eliminating imbalance, we think it is less intrusive and more remedial to opt for the more conservative course.

In summary, the isolated promotion of Diane Joyce under the circumstances falls well on the permissible side of affirmative action.

CONCLUSION

For the reasons suggested above, the judgment of the court below should be affirmed.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1985

PAUL E. JOHNSON,

Petitioner,

vs.

TRANSPORTATION AGENCY, SANTA CLARA COUNTY CALIFORNIA, and SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 715,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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THE SUGGESTION OF MOOTNESS IS INCORRECT

The Respondents, the Transportation Agency and Local 715, Service Employees International Union (SEIU), incorrectly argue that the case is moot. Agency Br. 10. SEIU Br. 14-15. So long as Petitioner has remaining claims to compensation under Title VII, his case is not moot. *Firefighters Local No. 1784 v. Stotts*, 467 U.S. 561, 571 (1984) (employees' Title VII claims not moot after being restored to or offered their positions). Like the nonminority firefighters in *Stotts*, Petitioner although retired, still has outstanding claims for the pay differential between Road Dispatcher and Road Maintenance Worker II and pension contributions.[1] Petitioner's Lodging, (hereafter Pet. L.) § 1.

The Agency did not immediately promote Petitioner despite the express order by the District Court and the Agency never paid Petitioner the difference in wages. J.A. 147-148; Pet. L. § 1, 1-2. Petitioner's promotion on May 19, 1983, came only after the Agency created a third Road Dispatcher position in the South Yard to which Diane Joyce was appointed.[2] Joyce was appointed without notice or competition under the Merit System Rules, displacing a male Agency employee who had been working out of class as the road dispatcher in the South Yard. Pet. L. §1, 4. Apparently, the Agency delayed in pro-

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[1]The Agency did not make commensurate contributions to Petitioner's pension account until he was actually promoted. Consequently, Petitioner receives an estimated $50 a month less. Petitioner's Lodging (hereafter Pet. L.) § 1, 2.

[2]Prior to 1983, the two Road Dispatcher positions were in the East and West Yards. In 1976, Petitioner unsuccessfully requested creation of a Road Dispatcher position at the South Yard. Pet. L. § 1, 3.

moting Petitioner until it could create a new job so that Joyce could keep her promotion.[3]

Under Title VII's policy of "make whole" relief, Petitioner is entitled to the pay differential for those six months and commensurate pension contributions.[4] If the District Court's order is not reinstated, the Agency will be under no compulsion to compensate Petitioner fully for his economic losses resulting from the Agency's unlawful promotion decision. These outstanding claims for compensation mean that Petitioner's case is not moot.[5]

I. THE FINDINGS OF FACTS BY THE DISTRICT COURT CANNOT BE REVERSED ABSENT A SHOWING THAT THEY ARE "CLEARLY ERRONEOUS."

Respondents attempt to retry this case by rearguing the findings of fact made by the District Court and undisturbed by the Court of Appeals.[6] Without even acknow-

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[3]The 1982 Agency Affirmative Action Plan only lists two Road Dispatcher positions and does not state that a new position was contemplated. S.E.R. 206.

[4]The fact that Petitioner accepted payment from the Agency for the pay differential covering June, 1980 to December, 1982, does waive his claims arising out of the Agency's failure to comply with the District Court's order. SEIU Br. 10. The warrant did not include the last five months.

[5]It is unlikely that Petitioner is liable for attorney's fees. Agency Br. 11 n.7. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421-22 (1978) (denying attorney's fees to a prevailing defendant under Title VII, unless the suit was frivolous or without foundation).

[6]The Court of Appeals, in amending its opinion after denying Petitioner's motion for rehearing, implicitly acknowledged that the District Court's findings were not clearly erroneous. Pet. App. 48a-49a.

ledging that the findings of fact are subject to the "clearly erroneous" standard of review, Respondents attack the following findings of fact which are fatal to their legal arguments:

> —that the Santa Clara Transportation Agency did not discriminate in the past and does not now discriminate in the hiring and promotion of women. Pet. App. 13a;
>
> —that the examination and interview process was fair and in accordance with the Merit System Rules, Pet. App. 12a;
>
> —that, based on the examination and interview process, Petitioner was more qualified than Diane Joyce, Pet. App. 12a;
>
> —that but for Petitioner's sex, he would have been appointed, Pet. App. 13a; and
>
> —that Joyce's sex was the substantial and determining factor in her promotion. Pet. App. 13a.[7]

This Court recently analyzed the "clearly erroneous" standard of review for findings of fact by a District Court in *Anderson v. Bessemer City*, 470 U.S. 564 (1985).[8] This Court expressly held:

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[7]SEIU argues incorrectly that the finding of no past discrimination is entitled to no weight because both parties asked for it. SEIU Br. 10. The Agency offered extensive testimony of individual unrelated acts of alleged discrimination and argued that these acts, plus the work force statistics provided sufficient basis for affirmative action.

[8]In *Anderson v. Bessemer City*, 470 U.S. 564 (1985), the Court held that a finding of intent to discriminate was a finding of fact subject to the "clearly erroneous" standard of review under *Pullman-Standard v. Swint*, 456 U.S. 273 (1982).

> If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

Id. at 573-74, (*citing United States v. Yellow Cab Co.*, 338 U.S. 338, 342 (1949), and *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844 (1982)).

The District Court's extensive findings of fact followed a two day trial.[9] Respondents merely rehash the facts Petitioner established at the trial.[10] Nor can the Agency's Lodging concerning *Pacheco v. Santa Clara County Transportation Agency* rebut the District Court's finding. Any probative value of the consent decree is negated by the fact that this was a sexual harrassment case and the factual elements differ. *Meritor Savings Bank v. Vinson*, 106 S.Ct. 2399 (1986). This is insufficient to meet the very heavy burden necessary to create the "definite and firm conviction that a mistake has been committed." *Anderson v. Bessemer City*, 470 U.S. 564, 573

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[9]Most of the Agency's evidence consisted of post hoc rationalizations for the Plan. This method of justifying discrimination was questioned in *University of California Regents v. Bakke*, 438 U.S. 265, 295 n.34 (1978).

[10]SEIU cites Exhibit 12, as proof that the candidates were equally qualified. SEIU Br. 9; J.A. 27-28. The document, which purports to summarize the candidates' qualifications, was prepared *after* the Director had decided to appoint Joyce, RT II, 222:21 to 226:22, by an employee who played no role in the decision, RT II, 219:3-4, and without reference to the candidates' scores from the two oral boards.

(1985) (*citing United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)).

II. RESPONDENTS' CLAIMS TO REMEDIAL PURPOSE FOR THE PLAN ARE BASED ON INADEQUATE DATA AND POST HOC RATIONALIZATIONS.

Respondents argue that the work force statistics were sufficient to support the Plan's employment goals, and, by implication, the District Court's finding was not clearly erroneous. However, the statistics were too incomplete to support any inference of discrimination, let alone prove that the District Court's finding of fact was clearly erroneous. The local labor pool could never have supported the employment goals for women in the plan. These hiring patterns create an inference that very few women ever applied, and those that did were hired.

Without any credible evidence of discrimination, the District Court correctly declined to infer a remedial purpose for the Plan based solely on the statistical imbalances. Pet. App. 9a. The Court of Appeals ignored the District Court's finding of fact that the Agency had not discriminated by concluding that it was irrelevant. Rather the statistical differences in the number of women employed by the Agency and the number of women working generally in the county constituted historical job segregation that supported the Plan. Pet. App. 26a, 49a. This conclusion ignored the record which offered a number of explanations for the statistical differences.

Gross disparities in the racial composition of a workforce, without explanation, may be a 'telltale' sign of discrimination. *Teamsters v. United States*, 431 U.S. 324, 340

(1977). However, statistics can be rebutted like other circumstantial evidence.[11]

Respondents incorrectly state that Petitioner failed to rebut the statistics. Agency Br. 21. SEIU Br. 19. Petitioner's counsel established in testimony that few, if any, women applied for road crew work despite extensive recruiting efforts, that the Road Dispatcher job should have been classified as Office and Clerical, for which there was no underrepresentation of women, and that the Agency could not show that any women had ever applied for Skilled Craft Worker jobs because it did not keep any applicant statistics.[12] The record and census data further support Petitioner's claims that the statistics do not war-

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[11] If the defendants in a Title VII suit believe there to be any reason to discredit plaintiffs' statistics that does not appear on their face, the opportunity to challenge them is available to the defendants just as in any other lawsuit. They may endeavor to impeach the reliability of the statistical evidence, they may offer rebutting evidence, or they may disparage in arguments or in briefs the probative weight which the plaintiffs' evidence should be accorded.

Dothard v. Rawlinson, 433 U.S. 321, 338-39 (1977) (Rehnquist, J., concurring).

[12] SEIU argues that experience barriers for the Road Dispatcher position excluded women. SEIU Br. 12. However, the job required either dispatcher or road maintenance experience. Moreover, women were not underrepresented because the Agency employed 15 Dispatchers, 3 of whom were women when Petitioner was denied his promotion. S.E.R. 69. By 1981, 8 women of the 33 positions were dispatchers, excluding Joyce. S.E.R. 202. The California census data show that in 1970 the relevant labor market for women dispatchers was 16.3%, compared to the Agency's 20% women dispatchers. Pet. L. § 3 at 3.

rant an inference of discrimination against women.[13] The Agency's hiring patterns suggest that few, if any, women applied, that the Agency hired minority employees, and that 66% of the new positions went to members of the protected groups. Thus, Respondent failed to make a *prima facie* case that there was discrimination requiring a remedy.

A. The Affirmative Action Plan Incorrectly Presumes "Underrepresentation" Without Reference to the Relevant Labor Pool.

Respondent Agency did not keep data of the applicants and, therefore, could not show that the statistics were not the product of self-selection. The District Court correctly declined to find the statistical disparity probative because the statistics do not reflect the relevant labor pool. The long range employment goals in the Plan are based on the raw percentages of women and minorities in the work force, without reference to relevant labor pool.[14] Therefore, the conclusions of significant underrepresentation of women are unsupported.

This Court has recognized that statistics are probative only when there is a gross disparity in comparison to the relevant labor market. *Teamsters v. United States,* 431

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[13]This Court can take judicial notice of census data. *Castenada v. Partida,* 430 U.S. 482, 486 n.6 (1977). Photocopies of the census charts are provided in Pet. L. §§ 3-4.

[14]The Agency Director stated revision of the goals to reflect relevant labor market was discussed but "it never got very far." RT I 50:23-25; 51:1-5. Thomas protested that the goals were unrealistic. RT II 263:6-20. SEIU's effort to discredit Thomas' testimony is unfounded because the judge's comments were made long after Thomas' statement.

U.S. 324, 339-340, and n.20 (1977). When, as was the case here, the employer is selecting from within his workforce, the relevant labor pool is his own employees. *Shidaker v. Carlin,* 782 F.2d 746, 750 (7th Cir. 1986) (*citing Hazelwood School District v. United States,* 433 U.S. 299, 308 n.13 (1977)). Moreover, the facts of this case are very different from those in *United Steelworkers of America v. Weber,* 443 U.S. 193 (1979). The record is bereft of any evidence of segregation or exclusion and there is an express finding of fact that there was none. Nor should this Court take judicial notice of cases finding discrimination against women in construction trades or other studies, as suggested by the Court of Appeals and Respondents' amici. None involve this employer and are, therefore, irrelevant. While Title VII forbids equally both types of discrimination, unlike race, one cannot readily assume that absent discrimination women would be equally represented in all aspects of the work force. Personal and societal attitudes shape women's career and job choices. Furthermore, expanding job opportunities may give women the choice between nontraditional jobs, outdoor or indoor, at comparable pay and opportunity. This theory is consistent with the Agency's difficulty in recruiting women for road maintenance (Service & Maintenance), in comparison to the successful recruiting program for bus drivers (also Service & Maintenance). All of the above factors, unrelated to employment discrimination by the Agency, probably contributed to the statistics at issue here.

Other courts have declined to apply the "gross disparity" rule to sex discrimination without scrutinizing the data supporting the statistics. In *EEOC v. Sears Roebuck & Co.,* 628 F. Supp. 1264 (N.D. Ill. 1986), the court

rejected the EEOC's assumption of discrimination based on a statistical disparity because the EEOC also assumed that men and women were equally interested in commission sales jobs, a fact not supported by the evidence. "[T]he assumptions underlying any statistics must be critically examined by the court." *Id.* at 1287. The lack of applicant data and other information make it impossible to determine whether the disparity has any relation to possible discrimination.

The questions raised about the statistics are supported by census data which shows that the relevant labor market for the allegedly "underrepresented" EEOC categories was never 36.4% as the Plan assumed. The employment goal is based on the raw labor force statistics for Santa Clara County and is incorrect because it fails to deduct the women in occupations not employed by the Agency.[15] Pet. L. § 4-5. Overall, the Agency's employment is close to the relevant labor market for the respective job category,[16] except Skilled Craft Worker. Even here the labor pool was 5%—not 36.4% as prescribed in the plan.

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[15]In 1970, 50,423 women (34% of all women working) in the county were employed in occupations not used by the Agency, such as nurses, teachers, etc. Pet. L. § 4. This female incumbency reduces the available women to 24% of the total county work force, rather than 36.4%.

[16]Data from the 1970 census is used because the plan's goals were based on the 1970 census. In the "Service & Maintenance" category, 22% of the Agency employees were women, as compared to 32% in the labor pool. Pet. L. § 4. In the "Official and Administrator" category, 8.6% of the Agency employees were women as compared to 15% in the labor pool. In the "Professionals" category, 8.6% of the Agency employees were women, as compared to 2% in the labor pool. In the "Office and Clerical" category, the Agency and labor pool were both 75%. In the "Technicians" category, 9.7% of Agency employees were women, as compared to 12% in the labor pool. In the "Skilled Craft Worker" category, there were no women as compared to 5% in the labor pool.

B. Agency Hiring Patterns Suggest that Few Women Applied and Those That Did Were Hired.

The District Court's finding of fact that the Agency did not discriminate is supported by the hiring patterns from 1978 to 1981 which suggest that the statistical imbalances are due to self-selection and not discrimination. Comparisons of the Work Force Utilization Charts in the 1978 and 1982 Agency Plans, S.E.R. 62-70, 194-209, show that the Agency added a total of 749 new positions, excluding clerical where neither women nor minorities are underrepresented.[17] Of the new Agency positions, 496 were filled by protected group employees (101 women, 393 minorities, and 2 handicapped employees) which represent 66% of the new jobs.[18] Minority hiring outstripped women in "Service & Maintenance" and "Skilled Craft Worker" categories and was comparable in the other EEOC categories. This pattern shows that notwithstand-

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[17]Petitioner incorrectly interpreted the Plan as anticipating no new positions in the Roads Division. Pet. Br. 35, 41. Of the 119 new positions in Skilled Craft Worker category, 25 were in the Roads Division. S.E.R. 206. Of these 25 new positions, 13 were new job classifications (Construction Inspector I, Traffic Painter I). S.E.R. 204-206.

[18]The Agency hired 6 women, 57 minorities, and 1 handicapped employee for 119 new positions in "Skilled Craft Worker" category. For the 524 new "Service & Maintenance" positions, the Agency hired 79 women and 305 minorities. For the 80 new "Technical" positions, the Agency hired 19 women, 21 minorities. For the 30 new "Professional" positions, the Agency hired 16 women, 11 minorities, and 1 handicapped. For the four new "Administrator" positions, the Agency hired one woman. S.E.R. 193.

ing aggressive affirmative action hiring, very few women, by comparison to minorities, were hired. This can only be explained on the basis that there were very few women applicants.

III. THE EMPLOYMENT GOALS IN THE AFFIRMATIVE ACTION PLAN VIOLATE THE FUNDAMENTAL PRINCIPLES OF TITLE VII AND THEIR INVALIDATION WILL NOT HINDER VOLUNTARY COMPLIANCE.

There being no evidence in the record to justify reversal of the District Court's finding of fact that the Agency did not discriminate, the only question is whether the Agency can justify its blatant sex discrimination against Petitioner on the basis of its Affirmative Action Plan that seeks to achieve a statistically balanced workforce.[19] Title VII flatly prohibits discrimination on the basis of sex. 42 U.S.C. § 2000e(a). This Court created a very narrow exception to Title VII's flat prohibition in *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979). This prohibition of discrimination is more absolute than the standards for the Fourteenth Amendment, which balances the government's reasons for a sex based classification against the impact on the individual's rights.

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[19]SEIU argues that Petitioner has no claim because the Merit System Rules permit selection of any of the top seven candidates. SEIU Br. 8. The District Court correctly rejected this argument, stating "promotion on the basis of gender is a *prima facie* transgression of Federal law, and to that extent the discretion of the appointing authority must be limited." Pet. App. 4a. Nor does state law foreclose judicial review of a federal claim. SEIU Br. 30.

Under this Court's decision in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the Agency had to carry the burden of persuasion in establishing a nondiscriminatory reason for discriminating against Petitioner.[20] Even under the *McDonnell Douglas* analysis whereby the Agency had the burden of persuasion to rebut Petitioner's case, the record shows that the Agency failed to carry it by not meeting the *Weber* criteria. *Weber*, 443 U.S. at 208.

Again, the District Court's findings of fact are conclusive. The District Court held that the Agency had not discriminated against women, thereby precluding the conclusion that the Plan's purpose was to "break down historical patterns of segregation or hierarchy." The District Court also held that the Plan was permanent. Pet. App. 13a. Failing two of the four factors considered in *Weber*, the District Court concluded that the Plan was not a valid reason to discriminate and the Agency failed to carry its burden [of going forward to rebut Petitioner's *prima facie* case.] Pet. App. 8a.[21]

The Agency, *citing Wygant v. Jackson Board of Education*, 106 S.Ct. 1849, 1855 (1986) (O'Connor, J., concur-

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[20]The Affirmative Action Plan is not "nondiscriminatory." Thus, the case of *McDonnell Douglas* is not necessarily controlling. Pet. Br. 45-48. The employer, who alleges affirmative action as a defense, should bear the ultimate burden of proving its validity.

[21]The District of Columbia Circuit imposes a higher burden of persuasion on the employer to justify affirmative action. *Toney v. Block*, 705 F.2d 1364, 1366 (D.C. Cir. 1983) (burden of persuasion by 'clear and convincing' evidence) *following Day v. Mathews*, 530 F.2d 1083 (D.C. Cir. 1976).

ring), argues that it need only show that there is a "firm factual basis to infer that they might have discriminated."[22] Agency Br. 13. SEIU, citing *Weber*, argues that only a "factual predicate" is necessary. SEIU Br. 15-16. The Agency's "firm factual basis" is the testimony and the and the Plan's "work force statistics." The fatal flaw in Respondents' arguments is that they describe a decision making process that never occurred. Moreover, had Respondents attempted such an inquiry, the testimony and statistics are wholly insufficient to permit them to infer discrimination, and therefore, are insufficient to immunize Respondents from liability for blatantly discriminating against Petitioner.

As a minimum, the employer should be required to show a *prima facie* case of discrimination before instituting an affirmative action plan that allocates job rights based on sex and race. The statistics in the Plan never met that legal minimum. The "disparity" is not based on the relevant labor market or applicant flow data.[23] Because Respondents' statistics are not based on the relevant labor market, the Agency never established a *prima facie* case.

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[22]Respondents concede the applicability of the Fourteenth Amendment by citing constitutional cases. Respondent also misinterprets Petitioner's point that he makes no claim under the Fourteenth Amendment, but because Respondent is a public employer, it provides the relevant standard. Agency Br. 43-44.

[23]Respondents cite *Teamsters v. United States*, 431 U.S. 324 (1977) and *Hazelwood School District v. United States*, 433 U.S. 299 (1977) for the rule that statistics alone can establish a *prima facie* case. Agency Br. 19-20; SEIU Br. 19-20. However, these cases hold that labor pool data, not general work force data, is probative, and any statistical disparity must be unexplained.

Implicitly conceding that there is no *prima facie* case of discrimination against women to justify the Plan, Respondents complain that to require anything more would force the employer to admit liability under Title VII and expose the employer to lawsuits from minority or women employees. Respondent and amici also assert that invalidating the Plan's employment goals will obstruct voluntary affirmative action. Agency Br. 40. They exaggerate the difficulties presented and ignore the statute's mandate. This Court has clearly held that "voluntary compliance" under Title VII does not permit an employer to ignore other legal obligations. *See W. R. Grace & Co. v. Local Union 759 (Rubber Workers)*, 461 U.S. 757 (1983) (voluntary compliance under Title VII does not warrant breach of collective bargaining agreement); *see also Connecticut v. Teal*, 457 U.S. 440 (1982) (promotion test's disparate impact violates Title VII even though under affirmative action the employer promoted more blacks than whites). It would be extremely anomalous for the Court to hold that a private employer cannot avoid its obligations under a collective bargaining agreement which may conflict with voluntary Title VII compliance, but that a public employer is permitted to completely ignore its constitutional obligation not to discriminate on the basis of sex solely to serve the interest of voluntary compliance. Nor is there any authority or reason to give a public employer greater leeway in implementing affirmative action. The law is explicit and the cases recognize no exception for a public employer.

In light of Title VII's explicit mandate, merely proffering an affirmative action plan should not be a suffi-

cient defense. It is not unreasonable to require an employer to engage in careful scrutiny and reach a conclusion, which can be defended in court, that there has been actual past discrimination. Only the employer can know whether its hiring and promotion practices have been tainted with a discriminatory animus. Without such an effort, there is no reasonable basis for holding that the Plan is intended to be remedial. When the plan is concededly discriminatory, it is entirely appropriate to require the employer to shoulder the burden in justifying it.

There is no evidence in the record that the Agency undertook a careful scrutiny of its employment practices. The phrase "to remedy the effects of past discrimination" first appears in the 1972 County affirmative action plan and appears verbatim in the Agency 1978 and 1982 plans, as well as the 1979 County Plan. J.A. 31, 112, 133. Its repeated use suggests that the Agency relied on this phrase without any analysis or review. Second, the record shows that the employment goals were never revised despite annual reviews. Third, the Agency never tried to use the relevant labor market data. Fourth, the Agency never bothered to collate applicant data, although it is required in the Plan. J.A. 62-63; 71-72; 85-86.

The Agency Plan is hardly typical of affirmative action plans. Invalidation of the employment goals should have no effect on most affirmative action which is less burdensome. For example, the Plan featured a number of alternatives to goals: training programs, creation of entry level positions, and recruiting. RT II, 264:2 through 267:13; J.A. 71-84. The record shows that these actions were successful, 137 women were hired in nontraditional jobs as "coach operators" and as "utility workers," an entry level position for mechanic. J.A. 49-50.

IV. THE PLAN IS NOT NARROWLY TAILORED AND UNNECESSARILY TRAMMELS INDIVIDUAL RIGHTS IN VIOLATION OF THE STANDARDS OF THE FOURTEENTH AMENDMENT AND WEBER.

Even if the Agency had established a predicate for the Plan's employment goals, they are not narrowly tailored and place the full burden on unprotected employees.[24] Respondents' argument that a promotion always forecloses advancement and the Petitioner was not entitled to a promotion miscasts the question. Petitioner's rights are protected by Title VII and the Plan trammeled Petitioner's rights. It also ignores the fact that Petitioner is entitled to be judged against nondiscriminatory standards. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

Moreover, promotion is different from hiring. Respondent Agency's most cynical statement is that, in effect, the Court should ignore the fact that Petitioner has been singled out for discriminatory treatment. Agency Br. 37. But, this is a case about a single employee who devoted his career with the Agency to obtaining a promotion to Dispatcher. There were relatively few oppor-

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[24]Beals testified that the Plan would never protect white males.

> Q: In your mind, if an individual were to apply for a position in the office and clerical category broadly, and that individual were a male, all things being equal, would that individual be given any additional consideration relative to a woman applying for a position in the same category?
>
> A: That was not the concern of the plan, as I understood it, because white males were not members of protected groups.

RT II, 243:16-22.

tunities for promotion. Petitioner could advance to either Road Maintenance III or Road Dispatcher. By all criteria, he succeeded in becoming the best qualified candidate for the job. He was denied that job *because of his sex*. This is different from a job applicant, because the latter has not invested any time or loyalty and has a variety of other places to apply. All of the abstract legal theory cannot alter the fact that but for the Agency's action is fundamentally unfair and should not be permitted unless the Agency had a powerful justification for its action. The Agency's generalized desire to achieve a balanced workforce cannot justify the arbitrary denial of a promotion to Petitioner.

The Plan's stated purpose of achieving a balanced work force which applies to all jobs places undue and possibly unlawful burdens on unprotected employees. Title VII does not require or permit an employer to discriminate in order to have balanced work force.[25]

The absence of narrow tailoring is also demonstrated in the fact that the Plan operates to bar white males from advancement whenever competing with a "protected employee." The Resopndents do not disagree that the Plan imposes substantial personal career penalties for the director who fails to meet affirmative action goals. Pet. Br. 40-42. The Plan also states that "special consideration" should be given to any eligible member of a protected group, when the job is underrepresented. J.A. 60.

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[25]Even for proven and egregious violations of Title VII as in *Local 28 Sheetmetal Workers v. EEOC*, 106 S.Ct. 3019 (1986) (upholding affirmative action remedies, including quotas, training program, and compliance supervision), the court's remedy did not include the requirement that the employer balance his entire work force.

While sex or race is allegedly "one factor," the unrealistic nature of the goals and the pressure to meet them make affirmative action a dominant factor. This is more burdensome than a quota and there is no limit on the use of affirmative action other than the long range goal.

The reaction of the other Agency employees when Joyce was appointed demonstrates the damage to employee morale when the Plan was applied to deprive Petitioner of his promotion. The random use of the Plan made a mockery of the merit system and left the employees disenchanted about its ability to protect their interests. However, employee dissatisfaction was not based on sexual discrimination. Agency Br. 3 n.5. The record leaves little doubt that both the Agency and SEIU lost substantial credibility in discriminating against Petitioner.[26]

The Plan's operation as shown by the hiring patterns of the Agency between 1978 and 1981 also demonstrate the lack of narrow tailoring that trammels individual rights. The Plan's goal of statistical parity in each major job classification makes the plan permanent for all practical purposes. *Ante* at 10-11. Minority hiring dominated new job appointments, especially in the skilled craft and service and maintenance categories because the goal of statistical parity applied to all major job classi-

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[26]SEIU's support for the Plan's goals is of questionable validity. "The same reasons which prohibit an employer from discriminating on the basis of race among the culpable employees apply equally to the union(.)" *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 285 (1976). Petitioner was a member of SEIU until the events culminating in this lawsuit. Pet. L. § 1, 4.

fications. Without any provision to end affirmative action when the goal is met in a given EEOC category or job classification, the Agency employs 2 women Road Dispatchers of the 3 positions. S.E.R. 208. With Joyce's promotion, affirmative action should have ended for the Road Dispatcher position. However, because the goal had not been met in the larger EEOC category, affirmative action supported employing another woman. S.E.R. 202. Given the admitted difficulty in achieving the balance sought in all categories at the same time,[27] it is apparent that the Plan is indeed permanent and will operate to maintain parity while trying to achieve parity in other categories and classifications.

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[27]Given the Plan's perpetual application, the use of the term "attain" rather than "maintain" is meaningless. SEIU Br. 13.

CONCLUSION

For these reasons, Petitioner asks this Court to reverse the decision of the Court of Appeals.

Respectfully submitted,

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No. 85-1129

In the Supreme Court of the United States

OCTOBER TERM, 1986

PAUL E. JOHNSON, PETITIONER

v.

TRANSPORTATION AGENCY, SANTA CLARA COUNTY, CALIFORNIA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether respondent, a public employer, violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, by promoting a female employee over petitioner, a more-qualified male employee, pursuant to an affirmative action plan.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, prohibits, inter alia, gender discrimination in employment. The Attorney General is responsible for enforcement of Title VII where, as here, the employer is a government, governmental agency, or political subdivision. 42 U.S.C. 2000e-5(f)(1). This Court's resolution of the issues presented in this case could accordingly have a substantial effect on the Attorney General's enforcement responsibilities. The federal government, which is the nation's largest employer, is also subject to the requirements of Title VII in that capacity. 42 U.S.C. 2000e-16.

STATEMENT

1. Petitioner is a male who began working in 1967 for respondent Transportation Agency, Santa Clara County, California. Petitioner applied for a position as a road dispatcher, a promotion opportunity posted by respondent in 1979. He and the eight other applicants who filled out an application form were interviewed and scored by respondent's oral board. Petitioner scored a 75; another

applicant, Diane Joyce, scored 72.5 A second oral board was conducted for those applicants who passed the first, and this board unanimously recommended petitioner for the promotion. Pet. App. 10a-11a.

During the selection process, Joyce contacted the Women's Coordinator for Santa Clara County, who contacted respondent's Affirmative Action Coordinator, who recommended to respondent's director, James Graebner, that he promote Joyce (Pet. App. 11a-12a). Graebner did so. He testified that he viewed the applicants as "essentially equal in qualification" (*id.* at 3a), that he predicated his decision to promote Joyce on the fact that there had never been a female road dispatcher, and that he relied on the goals expressed in the agency affirmative action plan in reaching his decision (*id.* at 6a). Affirmative action plans, adopted voluntarily by the County and its Transportation Agency, set as a goal the employment of women at a rate consistent with the percentage they comprise of the county-wide work force (J.A. 38, 113, 133).

2. Petitioner complained to the EEOC, received a right-to-sue letter, and sued respondent under Title VII. The district court ruled in his favor. It stated first that it was "satisfied by a preponderance of the evidence that the gender of Joyce was *the determining factor* in her selection" (Pet. App. 4a (emphasis in original)).[1] Concluding, therefore, that there was a prima facie case of discrimination, the court turned to the remaining question, on which it stated respondent had "the burden of going forward with the evidence"—"whether the preferred treatment accorded Joyce on the basis of her gender is justified" by respondent's affirmative action plan (*ibid.*).

The court took as its starting point for this inquiry four standards derived from *United Steelworkers* v. *Weber*, 443 U.S. 193 (1979), upon which this Court predicated its approval of the plan there involved (Pet. App. 5a):

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[1] See also Pet. App. 12a-13a (findings of fact) (petitioner "was more qualified for the position of Road Dispatcher than Diane Joyce" (see also *id.* at 14a ¶ 3); "[b]ut for [petitioner's] sex, male, he would have been promoted to the position of Road Dispatcher"; and "[b]ut for Diane Joyce's sex, female, she would not have been appointed to the position of Road Dispatcher").

whether the plan was designed to break down old patterns of (in the present case) gender segregation and hierarchy; whether the interests of male employees were unnecessarily trammeled by requiring their discharge and replacement with female hirees; whether the plan created an absolute bar to the advancement of male employees; and whether the plan was a temporary measure, not intended to maintain a gender balance, but rather to eliminate a manifest gender imbalance (*id.* at 6a).

After reviewing the evidence, the court determined that respondent had failed to carry its burden of showing that the plan was intended to be temporary (Pet. App. 6a-8a).[2] The district court also found that respondent "has not discriminated in the past, and does not discriminate in the present against women in regard to employment opportunities in general and promotions in particular" (*id.* at 13a). The district court thus found that there had been no showing that the plans had been adopted to break down old patterns of segregation and hierarchy, but the court said expressly that it was not relying on this finding in ruling for petitioner (*id.* at 9a-10a). With regard to the remaining two *Weber* factors, the district court also found that respondent had "unnecessarily trammeled [petitioner's] interests" and had "creat[ed] an absolute bar to his promotion to the position of Road Dispatcher" (*id.* at 14a), but did not elaborate on these findings. The court concluded that petitioner was entitled to relief, and ordered that he be promoted and reimbursed for back pay.

3. The Ninth Circuit reversed (Pet. App. 17a-50a). It also considered *Weber* to be the key precedent, and determined that while "[t]he [Supreme] Court has yet to

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[2] See also Pet. App. 13a (findings of fact) ("The Affirmative Action Plan had no end date or other provision which would have the effect of ending preferential treatment to women" (citations to record omitted).); *id.* at 14a (conclusions of law) (the plan was "interpreted in such a fashion so as to attempt to maintain an ongoing balance"; respondent "failed to demonstrate that the * * * Plan * * * will end or be modified in any way at any point in time or when [respondent's] work force composition as a whole, by department, by EEOC category or [respondent's] major job classification reaches a certain number of percentage of women").

'define in detail the line of demarcation between permissible and impermissible affirmative actions plans,' * * * the Court noted several aspects of the *Weber* plan that placed it 'on the permissible side of the line' "—*i.e.*, the same four the district court had discussed in coming to the opposite conclusion: "[t]he plan (1) was designed to break down old patterns of racial segregation and hierarchy, (2) did not unnecessarily trammel the interests of white employees, (3) did not create an absolute bar to the advancement of white employees, and (4) was a temporary measure, 'not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance' " (*id.* at 22a (quoting *Weber*, 443 U.S. at 208)).

The court went through the listed factors, concluding, first, that just because the plan did not purport to be temporary did not mean that it was permanent, since the plan did not say on its face that it was permanent, and certain testimony to the contrary could be discounted if "[r]ead in context" (Pet. App. 23a-26a). Second, the court held that, in order to show that a plan was designed to break down old discriminatory patterns, it is not necessary for the employer to show its own history of purposeful discrimination, so long as it shows a "conspicuous imbalance in its work force" (*id.* at 26a)—asserting, in this regard, that "not one of [respondent's] 238 skilled craft [positions] was [held by] a woman" (*id.* at 27a).[3] The court also determined that just because petitioner did not get the promotion did not mean there was an absolute bar to his promotion: "The fact that [Joyce's] sex may have been the decisive factor in the selection of a woman * * * does not indicate that men will always be excluded" (*id.* at 29a). Thus, the court concluded that respondent's plan, like the *Weber* plan, fell on the permissible side of the line.

In dissent, Judge Wallace "conclude[d] that the record before us is insufficient to make broad pronouncements of judicial policy" (Pet. App. 32a). He said that he would remand the case because "the record suggests that the district court improperly allocated the burdens of persua-

[3] But see, *e.g.*, page 26 note 18, *infra*, for a discussion of what the record reveals concerning this "imbalance."

sion and production between the parties," and because "the court did not make sufficiently detailed findings on the plan to hold it invalid" (*ibid.*).

As to the burdens of persuasion and production, he concluded that affirmative action plans should be viewed as affirmative defenses; that the majority incorrectly concluded that respondent need only show " 'some evidence' " that the plan was in response to a conspicuous work force imbalance and was reasonably related to a remedial purpose, after which it was up to petitioner to show the plan to be invalid; and that, since it was unclear how the district court allocated the burdens of going forward and persuasion, the case should be remanded (Pet. App. 39a-40a).

On the validity of the plan, the dissent reviewed the same four *Weber* factors and concluded that the panel majority had failed to establish persuasively that any of them had been met. Setting forth his own view of how those factors should have been interpreted by the district court, Judge Wallace noted: (1) that with respect to whether the plan breaks down historic patterns of discrimination, "an employer cannot rely on statistics alone as a short-cut around the critical need for causal evaluation and analysis" (Pet. App. 43a); (2) that, with respect to whether the plan unnecessarily trammels the interests of non-minority employees, the record demonstrated no "serious evaluation" aimed at establishing the "reasonableness of the plan with respect to non-minority employees" (*id.* at 44a); (3) that there was similarly insufficient analysis of the extent to which the plan bars the advancement of non-minority employees (*id.* at 44a-45a); and (4) that the case should also be remanded to the district court for it to consider whether the plan is only temporary, since the majority read *Weber* too broadly in finding that it was (*id.* at 45a-46a).

INTRODUCTION AND SUMMARY OF ARGUMENT

This case is the Court's first plenary consideration of a claim under Title VII of the Civil Rights Act by a male for gender discrimination in respect to promotion by a public employer, who was acting pursuant to an affirma-

tive action plan. It thus presents difficult issues, the answers to which can only be arrived at by extrapolation from the Court's past decisions.

In considering when discrimination by a public employer is authorized by Title VII, any constitutional limitations on such official discrimination carry over to Title VII, thus avoiding an interpretation of Title VII which would render it pro tanto unconstitutional.[4] To be sure, Title VII may be—and in its application to private employers clearly is—more restrictive of employer conduct than the Constitution. But insofar as it grants a cause of action to a class of employees, it should not be read as authorizing affirmative discrimination by an employer which would be forbidden by the Constitution. This interpretation should obtain whether or not a plaintiff also claims a violation of the Constitution as such.

As a starting point for analysis, we affirm that just as this Court has repeatedly stated that Title VII protects all individuals regardless of race from racial discrimination, lower court decisions, unquestioned administrative practice, and the text of the statute itself make clear that Title VII protects men as well as women from gender discrimination. The dilemma posed by this case, like that confronted by this Court most clearly first in *United Steelworkers* v. *Weber*, *supra*, and several times last Term, arises out of the use of an affirmative action plan

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[4] An initial difficulty may be put to one side: that the public employer's action complained of is gender, not race, conscious and thus in a constitutional setting would presumably not have to survive the strictest level of scrutiny. There is no reason to conclude that Congress in enacting Title VII intended employers to be freer to discriminate on grounds of gender than on grounds of race. Whatever the constitutional difference between the two forms of discrimination, for purposes of this statute they must meet the same level of justification if the employer is to escape liability (excepting only the narrowly confined "bfoq" defense, which applies to gender but not race discrimination). To be sure, the contents of the justifications an employer will offer may differ in the case of gender, but the level of scrutiny any such justification must meet will be the same. Accordingly, we draw on cases dealing with the two kinds of discrimination without distinction—a procedure which would be inappropriate were we dealing with age or handicap discrimination.

which is alleged to commit the employer to exactly the discrimination the statute's literal language forbids, but does so in order to favor a group whose disadvantage was surely a motivating force behind the statute.

One resolution of this dilemma would focus on this undoubted legislative motivation, permitting discrimination favoring the previously disfavored groups. This Court has firmly set its face against this resolution as early as *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976), and repeatedly reaffirmed that position. The history of discrimination against some in this country was to be met by a prohibition in principle of discrimination against any race, and against males as well as females. At the same time, the Court has declined to follow this principle to the limit of its logic. In several cases last Term, a majority of the Court in a variety of formulations made clear that race conscious (and therefore, we submit, gender conscious) measures may sometimes be permissible other than as a strict measure of corrective justice—*i.e.*, persons may be favored because of their race (or gender), and not because they themselves have suffered discrimination. As we understand it, the middle course taken in those cases would permit, in appropriately limited circumstances, race (or gender) conscious measures benefiting persons identified solely by group membership who have not themselves suffered specific discrimination, but only as a remedy for past discrimination.

Although some Justices have indicated in dicta that the list of justifying grounds may not be limited to remedying past discrimination, the weight of authority in this Court, including last Term's decisions in *Sheet Metal Workers* v. *EEOC*, No. 84-1656 (July 2, 1986), and *Wygant* v. *Jackson Board of Education*, No. 84-1340 (May 19, 1986), is that the mere history of discrimination in the society or community is not such a justification. And we infer correspondingly that a mere desire to achieve some numerical proportion or balance of races or gender cannot serve as a justification for discrimination. Indeed, the conclusion follows *a fortiori*, since any asserted imbalance may have come about without any choice or discrimination on the part of the employer at any time.

The justifying basis for non-victim-specific, race or gender conscious affirmative action on which the Court focused last Term and the middle course it there took must, therefore, be taken to refer to the remedying of past discrimination by the particular employer, not society at large. This middle course looks back to and resolves a possible ambiguity in the *Weber* case. In that case, too, the Court emphasized the specifically remedial role of a non-victim-specific, race conscious affirmative action plan, but in language which left uncertain whether it was prior discrimination or imbalance itself that was being remedied. In retrospect it seems clear that the Court in *Weber* was seeking not to leave open the door to mere "societal discrimination" as a justifying ground. Rather, it was seeking to solve an altogether different problem: the hardships faced by an employer who wishes to remedy his own prior discrimination on the one hand, but does not on the other wish in effect to concede liability for such past discrimination as a condition for escaping liability for what would otherwise be unjustified reverse discrimination. In various formulations last Term, the Court addressed the issue, but nowhere gave reason to doubt that the employer must have firm, objective grounds suggesting that he has engaged in discrimination.

The instant case is concerned with an identified individual claiming a specific and justifiable expectation of advancement in a career to which he had devoted many years. It thus raises a set of considerations first dealt with in *Weber* and explicated more fully in *Firefighters Local Union No. 1784* v. *Stotts*, 467 U.S. 561 (1984), and *Wygant*: though the Court will permit race-conscious (or gender-conscious) action to remedy past discrimination even if the action is not strictly corrective (*i.e.*, is not victim-specific), yet because such action is obviously in tension with a major premise of Title VII and the Equal Protection Clause—individuals not groups, and *all* individuals are protected against race or gender discrimination—such remedies must be narrowly tailored, and must trammel on the rights and expectations of innocent persons as little as possible. This conclusion requires consideration of two kinds of elements, the degree and focus of the harm to

those who are treated other than on their individual merits, and the availability of less burdensome alternatives. These elements require particular attention in this case. Because they did not receive this attention below, and indeed because in our view this record reveals not carefully tailored remedial action but a rather extreme example of casual social engineering heedless of individual rights, the decision of the court of appeals should not be allowed to stand.

ARGUMENT

RESPONDENT HAS FAILED TO JUSTIFY ITS DISCRIMINATION AGAINST PETITIONER BASED ON ITS USE OF AN AFFIRMATIVE ACTION PLAN

A. The Making Of Employment Decisions On The Basis Of Gender Is Presumptively Illegal Under Title VII, But Is Sometimes Permissible By Reference To A Number Of Factors Which This Court Has Found To Be Relevant

1. The overriding purpose of Title VII is to prohibit discrimination in employment on the basis of race, sex, or other criteria listed in the statute (42 U.S.C. 2000e-2(a)(1)). The Court has made clear that "Title VII requires employers to treat their employees as *individuals*, not 'as simply components of a racial, religious, sexual, or national class' " (*Arizona Governing Committee* v. *Norris*, 463 U.S. 1073, 1083 (1983) (emphasis in original) (quoting *Los Angeles Dep't of Water & Power* v. *Manhart*, 435 U.S. 702, 708 (1978)). Title VII protects whites as well as blacks (*McDonald* v. *Santa Fe Trail Transportation Co.*, *supra*), and men as well as women (*Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U.S. 669, 681 (1983). Certainly in the context of public employment, the protections of Title VII are at least coextensive with those afforded by strict scrutiny under the Equal Protection Clause, for gender as well as race.[5]

[5] As to all employers covered by Title VII, this Court's prior pronouncements on the constitutional permissibility of voluntary affirmative action programs by public employers are instructive with respect to Title VII's parallel bar of discrimination, since similar values and interests are at stake. Moreover, reliance on constitutional principles to the extent they are relevant to statutory

Like the constitutional right to equal protection, the Title VII protection against discrimination in employment

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reverse discrimination issues allows us to avoid unfortunate inconsistencies between a public employer's responsibilities under Title VII and the Constitution. Cf. *Wygant*, slip op. 7 (O'Connor, J., concurring).

With respect to public employers, presumably Congress did not intend to "authorize" unconstitutional behavior as a defense to a claim under Title VII or to provide less protection against discrimination under Title VII than is afforded under the Constitution. See, *e.g.*, *NLRB* v. *Catholic Bishop*, 440 U.S. 490, 500-501 (1979). As three members of this Court have put it (*Bushey* v. *New York State Civil Service Comm'n*, cert. denied, No. 84-336 (Jan. 7, 1985), slip op. 6 (Rehnquist, J., Burger, C. J., and White, J., dissenting from denial of certiorari)), it is doubtful that when Congress amended Title VII in 1972 to bring public agencies within its mandate it intended to allow those agencies to claim that their action is shielded under Title VII, even if the action may violate the Fourteenth Amendment. Indeed, the legislative history of the 1972 amendments demonstrates that Title VII was not intended to provide less protection against intentional discrimination than the Equal Protection Clause. See H.R. Rep. 92-238, 92d Cong., 1st Sess. 19 (1971), *reprinted in* Subcomm. on Labor of the Senate Comm. on Labor and Welfare, 92d Cong., 2d Sess., *Legislative History of the Equal Employment Opportunity Act of 1972*, at 78-79 (Comm. Print. 1972) (*Leg. Hist.*); see also S. Rep. 92-415, 92d Cong., 1st Sess. 10 (1971), *Leg. Hist.* 419. Cf. *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 286-287 (1978) (opinion of Powell, J.); *id.* at 329-339, 340 (opinion of Brennan, J., White, J., Marshall, J., and Blackmun, J.).

A question remains whether the discrimination at issue here should, solely because it is based on gender rather than race, be assessed under a less stringent standard of review. See *Craig* v. *Boren*, 429 U.S. 190, 197 (1976). In our view, any such diminution of judicial scrutiny would be directly at odds with the purpose and language of Title VII. As this Court has noted, Congress decided in Title VII to extend the same protection from discrimination based on race to discrimination based on sex. See *Los Angeles Dep't of Water & Power* v. *Manhart*, 435 U.S. at 709. Accordingly, relegating gender to "second-class citizenship" among the prohibited discriminatory criteria governed by Title VII would be contrary to congressional intent. We note that the immediate level of scrutiny for gender classifications had not been formulated or implemented by the Court when the 1972 amendments were enacted. Indeed, soon after the amendments were enacted, a plurality of this Court had suggested that the same strict scrutiny applies in the area of gender classifications as in the area of race. See *Frontiero* v. *Richardson*, 411 U.S. 677 (1973).

"cannot mean one thing when applied to one individual and something else when applied to a person of another color" (*Regents of the University of California* v. *Bakke*, 438 U.S. 265, 289-290 (1978) (opinion of Powell, J.)). See also *Wygant* v. *Jackson Board of Education*, *supra*. Nor does it matter if the discrimination's "purpose can be characterized as 'benign.'" *Bakke*, 438 U.S. at 294 (opinion of Powell, J.).

2. Where a court orders or an employer voluntarily gives a preference to a person against whom the employer has discriminated, this of course is wholly consistent with the principles stated above, since the victim's group characteristics are considered only insofar as is necessary to reverse the wrong done the victim by previously treating him as a member of that group and not as an individual. Victim specific, make whole relief is the natural and usual remedial corollary to the substantive "individual rights" principle of Title VII and the Equal Protection Clause. See, *e.g.*, *Ford Motor Co.* v. *EEOC*, 458 U.S. 219 (1982) (absent special circumstances, backpay period terminated by rejection of unconditional job offer accompanied by right to pursue court action for make whole relief); *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976) (retroactive seniority is available for victims of post-Act hiring discrimination); *Teamsters* v. *United States*, 431 U.S. 324 (1977) (constructive seniority available only for indentifiable victims). See also *Sheet Metal Workers*, slip op. 25-26, 32, 38, 40, 51 (stressing remedial context); *id.* at 2, 7 (Powell, J., concurring) (same); *id.* at 1 (White, J., dissenting) ("As the Court observes, the general policy under Title VII is to limit relief for racial discrimination in employment practices to actual victims of the discrimination.").

3. Over the years, employers and others, citing concern over the effects of past discrimination,[6] have adopted

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[6] Members of the Court have also recognized—as the constitutional strict scrutiny test allows—certain other occasions in which an employer may take into account group characteristics. Such justifications as recruiting undercover agents for work in a racially defined group or seeking diversity in an educational institution (see *Bakke*, 438 U.S. at 311-315 (opinion of Powell, J.);

race—or gender—conscious affirmative action plans, giving persons concrete advantages because they belong to groups which have or are being discriminated against although these individuals have themselves suffered no such discrimination. There is much, as we have pointed out, in the language and interpretation of Title VII that is in conflict with such an idea of affirmative discrimination along class lines. See *Stotts*, 467 U.S. at 579-583; *id.* at 587-588 (O'Connor, J., concurring); *Milliken* v. *Bradley*, 433 U.S. 267, 280-281 (1977); *Teamsters*, 431 U.S. at 367-376; *Milliken* v. *Bradley*, 418 U.S. 717, 738, 746 (1974); *Bakke*, 438 U.S. at 309 (opinion of Powell, J.); *Fullilove* v. *Klutznick*, 448 U.S. 448, 541 (1980) (Stevens, J., dissenting); see also *Ford Motor Co.*, 458 U.S. at 236-240.

The decision of this Court in *United Steelworkers* v. *Weber*, *supra*, established, however, that private race-conscious affirmative action plans may be permissible. And, in *Sheet Metal Workers*, the Court further held that race-conscious hiring goals may, at times, be ordered by a court as a necessary remedy for a recalcitrant defendant with an egregious and pervasive history of discrimination. The *Weber* Court did not define in detail the circumstances justifying such plans or "the line of demarcation between permissible and impermissible affirmative action plans" (443 U.S. at 208). Nor has any majority opinion of this Court ever set forth with precision any simple test or sweeping rule for determining under what circumstances class-based remedies are permissible.

Certain basic principles, however, may be discerned in this Court's opinions concerning the permissible legal and constitutional scope of affirmative action plans. The first principle is that, at least in the Title VII employment context, any race conscious affirmative measures, whether enacted voluntarily or pursuant to court order, must serve some remedial purpose. Further, all such action must be narrowly tailored to further this remedial goal with as

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Wygant, slip op. 3 (O'Connor, J., concurring); *id.* at 2-3 (Stevens, J., dissenting)) have not been suggested here and obviously have no application in this case.

little adverse effect as possible on innocent persons. We address these principles in turn.

B. Affirmative Action Must Be Remedial Of The Employer's Wrong

Weber justified affirmative action plans if they were "designed to break down old patterns of racial segregation and hierarchy" (443 U.S. at 208). This language was recognized at the time (see *id.* at 209 (Blackmun, J., concurring)), as pointing in two directions: that mere imbalances might justify such plans, or that such plans are permissible only if remedial. We believe several decisions last Term, as well as earlier decisions which the Court either cited or did not repudiate in *Weber*, resolve this ambiguity and permit the conclusion that race or gender conscious plans, which are not victim specific, must at least be remedial and remedial of the employer's past discrimination.

Principally we rely on the strong rejection of the notion that "societal discrimination" may justify such a plan. For if societal discrimination—*i.e.*, discrimination by others than the employer—cannot justify such a plan, then only the employer's own discrimination can serve as a predicate for remedial action. As the plurality wrote in *Wygant*, slip op. 6:

> This Court never has held that societal discrimination alone is sufficient to justify a racial classification. Rather, the Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination.

See also *id.* at 9 (requiring "sufficient evidence to justify the conclusion that there has been prior discrimination"); *Firefighters* v. *Cleveland*, No. 84-1999 (July 2, 1986), slip op. 2 (O'Connor, J., concurring); *id.* at 1-2, 3, 4 (White, J., dissenting) ("an employer may adopt * * * racially discriminatory hiring or promotion practices * * * only as a remedy for its own prior discriminatory practices"); *Fullilove*, 448 U.S. at 490-492 (opinion of Burger, C.J.); *id.* at 498 (Powell, J., concurring); *Bakke*, 438 U.S. at 307-310 (opinion of Powell, J.); cf. *Bazemore* v. *Friday*, No. 85-93 (July 1, 1986), slip op. 1 (White, J., for the

Court); *Stotts*, 467 U.S. at 587-588 (O'Connor, J., concurring) ("a court may use its remedial powers * * * only to prevent future violations and to compensate identified victims of unlawful discrimination") (citations omitted).[7]

A fortiori, a mere desire to obtain some numerical racial or gender balance, as was found sufficient in the court below (Pet. App. 26a), must be wholly unacceptable for remedial race or gender conscious discrimination, since there is lacking the assertion even of generalized or societal discrimination, which may have limited employees' free choice of occupation. When the purpose is statistical balance we are in the domain of untrammeled social engineering. See *Sheet Metal Workers*, slip op. 31-36, 38, 50, 52 (plurality opinion); *Weber*, 443 U.S. at 208; cf. 42 U.S.C. 2000e-2(j).[8]

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[7] The impermissibility of utilizing societal discrimination as an affirmative action predicate appears, if anything, even more compelling in the Title VII context. As the *Weber* Court noted (443 U.S. at 202-203), it was precisely this tragic history of blatant societal discrimination against blacks and other minorities which served as the primary impetus behind Congress's decision to outlaw differential treatment of any employee on the basis of race or gender. Congress cannot be taken to have contemplated abandoning this nondiscrimination principle whenever an employer maintained that it was engaging in such discriminatory treatment in order to ameliorate the effects of societal discrimination. For given the clear presence of the effects of societal discrimination in 1964 (and today), this would mean that Congress intended to permit discrimination designed to benefit minorities and women in every instance and thus to render its ban on discrimination against "any individual" a nullity from its inception. No such conclusion can be squared with either *Santa Fe* or the statute's plain language.

[8] See also, *e.g.*, *Sheet Metal Workers*, slip op. 52 (plurality opinion) (upholding membership goal in part because it was "not being used simply to achieve and maintain racial balance, but rather as a benchmark" to measure efforts to remedy past discrimination); *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424, 435 (1976) (in holding that the district court exceeded its authority by ordering annual readjustment of school attendance zones so that there would not be a majority of any minority in any given school, the Court emphasized that "[t]here was * * * no showing that those * * * changes in the racial mix * * * were in any manner caused by segregative actions chargeable to the [school officials]"); *Milliken* v. *Bradley*, 418 U.S. 717 (1974) (suburban school districts not obligated to remedy Detroit's prior segregative practices).

Thus, a history of past discrimination, in which the employer has participated, is a minimum predicate that must be met before an innocent person's employment opportunities may be denied pursuant to a class-conscious affirmative action plan benefiting non-victims of discrimination. Unless such action seeks to correct prior discrimination by the employer, its purpose simply cannot be said to "mirror those of the statute" (*Weber*, 443 U.S. at 208). Further, the plurality opinion in *Sheet Metal Workers* strongly indicates that that is currently the rule governing relief ordered by a court in a Title VII action (slip op. 50).

The Court's decision in *Weber* addressing a voluntary affirmative action plan is at least consistent with this conclusion and, particularly when read in conjunction with *Santa Fe*, seems clearly to support it. In upholding the plan before it, the *Weber* Court emphasized first that the plan was "designed to break down old patterns of racial segregation and hierarchy" (443 U.S. at 208). It noted that "blacks had long been excluded from craft unions," and cited in a lengthy footnote "[j]udicial findings of exclusion from crafts on racial grounds * * * so numerous as to make such exclusion a proper subject for judicial notice" (*id.* at 198 & n.1). Because of this union discrimination, and because the employer hired for that plant only persons with prior craft experience, its own hiring practices excluded nearly all black applicants to be skilled craftworkers. As the Court pointed out, "prior to 1974 only 1.83% (5 out of 273) of the skilled craftworkers * * * were black, even though the work force in the * * * area was approximately 39% black" (443 U.S. at 198-199). *Sante Fe* clearly held that the alleged discrimination against the two white petitioners in that case, if proven, violated Title VII. Surely, even though this Court in *Sante Fe* expressly declined to consider the subject of affirmative action plans, this discrimination by the employer would not have been rendered any more legitimate if it had been visited upon a *larger* number of

white employees.[9] We submit that it is precisely the remedial purpose of the employer's action in *Weber* that allows the cases to be seen as consistent with one another.

The principal issue regarding such voluntary affirmative action plans in the Title VII context in our view is no longer whether they must be remedial of the employer's own discrimination, but what quantum and burden of proof will serve to make out a sufficient remedial purpose. As to quantum of proof, any rule must, on the one hand, be sensitive to an employer's understandable reluctance to concede guilt, opening him to liability for past discrimination against women or minorities, and on the other hand, the emasculation of the remedial predicate, turning it into a mere matter of statistical balance after all. Nor should the employer be encouraged to immunize himself against suit by minorities and women by affirmatively discriminating against other classes when doing so has no remedial justification. Cf. *Bushey* v. *New York State Civil Serv. Comm'n*, cert. denied, No. 84-336 (Jan. 7, 1985), slip op. 5 (Rehnquist, J., Burger, C.J., and White, J., dissenting from denial of certiorari). In our view, the plurality opinion in *Wygant*, slip op. 9, properly resolved this tension by requiring the employer to "have sufficient evidence to justify the conclusion that there has been prior discrimination," in other words, "that the employer had a strong basis in evidence for its conclusion that remedial action was necessary."

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[9] Indeed, the employer in *Santa Fe*, "while conceding that 'across-the-board discrimination in favor of minorities could never be condoned consistent with Title VII,' contend[ed] nevertheless that 'such discrimination . . . in isolated cases which cannot reasonably be said to burden whites as a class unduly,' such as is alleged here, 'may be acceptable.'" The Court rejected this argument in emphatic terms: "There is no exception in the terms of the Act for isolated cases; on the contrary, 'Title VII tolerates *no* racial discrimination, subtle or otherwise.'" (427 U.S. at 280-281 n.8 (citation omitted), quoting *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 801 (1973) (emphasis added)).

As to burden of proof, we agree with Judge Wallace that the affirmative action plan in a Title VII lawsuit brought by a non-minority employee should be viewed as an affirmative defense. It follows therefrom that the burden of persuasion, not merely the burden of going forward, is on the employer to show that his plan rested on a proper predicate of prior discrimination, and was narrowly tailored to address that problem. Moreover, the relevant statistical proof and historical information is, of course, most easily collected by the employer.[10]

C. No Affirmative Action Plan Is Permissible Which Is Not Narrowly Tailored To Protect The Interests Of Innocent Persons While Working To Remedy The Prior Discrimination

This Court's decisions also establish that an affirmative action plan must be narrowly tailored to achieve its remedial objectives while at the same time intruding to the least extent practicable upon the expectations and interests of innocent third parties. This rule, which certainly defines the outer limits of court-ordered remedies (*Sheet Metal Workers*, slip op. 50-51; *id.* at 8-9 (O'Connor, J., concurring in part and dissenting in part)), for reasons explained above in respect to the remedial basis for such plans, pages 13-17, *supra*, is no less appropriate as a limitation on voluntary affirmative action plans. Moreover, the requirement that state action affecting suspect classifications be narrowly framed to accomplish a compelling state purpose is a familiar principle of equal protection jurisprudence, which was applied in evaluating the affirmative action plan at issue by the plurality in *Wygant* (slip op. 11-12):

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[10] Thus, we continue to believe that the approach set forth in our brief in *Weber* (at 21-22) is correct:

> [B]y showing that a racial classification was used for selection, respondent [Weber] made a prima facie showing of a violation of Sections 703(g) and 703(d) of Title VII * * *. Our submission is that the complainant's prima facie case was rebutted, because * * * a race-conscious selection device is properly used here for remedial purposes—as a means of voluntarily eliminating the effects of prior exclusionary practices.

> Under strict scrutiny the means chosen to accomplish the State's asserted purpose must be specifically and narrowly framed to accomplish that purpose. *Fullilove*, 448 U.S., at 480 (opinion of Burger, C.J.). "Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." *Id.*, at 537 (Stevens, J., dissenting).

We believe that the general approach set forth in our brief in *Weber* provides useful guidance. There we maintained (U.S. Br. at 21-22):

> Upon a finding of employment discrimination, a Court may order race-conscious relief * * *. Yet a race-conscious remedy is not lawful simply because a Court has imposed it: it is lawful because it is remedial and restores employment conditions, to the greatest extent possible, to what would have existed absent discrimination. As we shall show, Title VII does not prohibit employers or unions from voluntarily taking remedial measures that courts could order upon a finding of discrimination. Thus, where a particular program is appropriately tailored to remedy apparent employment discrimination and a Court could order the program as a remedy for proven employment discrimination, an employer is free to adopt the program voluntarily.[11]

It is thus necessary for a court reviewing a voluntary affirmative action plan to inquire not only as to the reasons why certain remedies were found necessary, but also to look closely to ensure that steps have been taken to avoid or minimize the discriminatory consequences of any relief necessary, and to focus it where serious prior discrimination calls for class-conscious relief. It should also examine the manner in which the plan actually operates, and the extent to which, in practice and in fact, it has an impact on innocent parties. It is quite possible, after all, for a plan to appear in one form on paper, but

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[11] This passage, of course, sums up the two-pronged approach the present brief urges in evaluating an affirmative action plan: that the plan be, first, remedial and, second, narrowly tailored to effect the remedy. It also stresses that the permissible boundaries of court ordered relief should act as a model for the limits on voluntary affirmative action. See discussion, *infra*, pages 20-23.

to have consequences in application which are very different.

Of particular importance is the degree and kind of impact on innocent persons. As Justice Powell noted in *Wygant*, slip op. 14, layoffs have a particularly crushing impact on identified individuals, and as we demonstrate below, pages 28-29, by the concrete circumstances of this case, class-conscious promotions may bear just as harshly on identified individuals. See also *Sheet Metal Workers*, slip op. 54 (stressing importance of avoiding harm to *existing* employees).

Further, in considering the closeness of fit between remedy and what is being remedied, it may turn out that only a particular geographic area or job progression within an employer's operations has suffered long-term effects of past discrimination. It may be a problem which, when focused on, can be fully addressed by changes in critical personnel or by affirmative action in the traditional sense of outreach and recruitment. Or it may be concluded that a different plan of specifically limited time duration will suffice to address the past discrimination.

In general, the court should examine the fit between the problem perceived and the means adopted to deal with it, and inquire whether other less offensive means exist to address the problem. See *Wygant*, slip op. 11 n.6 (citations omitted) (opinion of Powell, J.) (courts should look to see whether the "classification * * * 'fit[s]' with greater precision than any alternative means" and whether a " 'nonracial approach or a more narrowly tailored racial classification could promote the substantial interest about as well and at tolerable administrative expense' "); *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 420 (1977) (citation omitted) (" 'scope of remedy' " must fit " 'nature and extent' " of violation); *Dunn* v. *Blumstein*, 405 U.S. 330, 343 (1972) ("if there are other, reasonable ways to achieve * * * [compelling state interests] with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference"); *Fullilove*, 448 U.S. at 537 (Stevens, J., dissenting) ("Racial classifications are simply too

pernicious to permit any but the most exact connection between justification and classification.").

* * *

While we recognize that such an approach creates a tension for employers faced with the decision whether to embark on affirmative action, we believe that the tension is both manageable and useful. First, it ensures that the employer "act[s] with extraordinary care" (*Wygant*, slip op. 8 (plurality opinion)), the most minimal constraint required when dealing with racial or gender classifications. Such scrutiny by an employer, and if necessary, a court, will prevent the gratuitous or unnecessary use of racial preferences that are either needlessly overinclusive, casual social engineering, or the product of less noble motives such as the purely political desire to reward one's minority constituents or to insulate the employer from minority suits by discriminating against majority employees. See *Connecticut* v. *Teal*, 457 U.S. 440, 463-464 (1982) (Powell, J., dissenting). "Although voluntarily compliance is a laudable goal, members of this Court have recognized on other occasions that 'affirmative action' plans must be policed to prevent the practice of discrimination for discrimination's sake, see *Bakke*, *supra*, 438 U.S. at 307-310 (opinion of Justice Powell); cf. *Fullilove*, *supra*, 448 U.S. at 480 (opinion of the Chief Justice); and to protect the interests of innocent third parties, see *Weber*, *supra*, 443 U.S. at 208-209." *Bushey* v. *New York State Civil Serv. Comm'n*, cert. denied, No. 84-336 (Jan. 7, 1985), slip op. 5 (Rehnquist, J., dissenting from denial of certiorari). See also *Stotts*, 467 U.S. at 589 n.4 (O'Connor, J., concurring) (citations omitted) ("The policy favoring voluntary settlement does not, of course, countenance unlawful discrimination against existing employees or applicants."). "The ultimate goal must be to eliminate entirely from governmental decisionmaking such irrelevant factors as a human being's race" (*Fullilove*, 448 U.S. at 547 (Stevens, J., dissenting)). On the other hand, this careful inquiry still assumes that class-based affirmative action truly necessary to effectuate a remedial purpose will not be unduly impeded.

Moreover, any other approach would make largely illusory the requirement that adverse discriminatory consequences be kept to the minimum necessary to accomplish the remedial objective. One cannot know what is necessary as a remedy until one develops a concept of the wrong to be corrected. While mathematical precision may not be possible in such matters, it is possible generally to direct remedies at identified areas of discrimination, and to shape them in a way commensurate with the duration and pervasiveness of the discrimination.

This review not only ensures that the scope of the affirmative action does not exceed the nature and extent of the underlying violations, but also has the beneficial function of leading to permanent, meaningful reform in the employer's practices. The employer's process of determining the form and scope of its discrimination will act as a "spur or catalyst to cause 'employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history.' " *Weber*, 443 U.S. at 204 (quoting *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418 (1975)). In contrast, an employer that maintains, through discriminatory measures, the "appropriate" percentages of minority or female employees obviously has no incentive to engage in a searching examination of employment practices or identify those arbitrary barriers that act to exclude minority participation.[12]

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[12] *Firefighters* v. *Cleveland*, is not to the contrary. While the Court held that the relief provided in a consent decree need not conform to the limits on court-ordered relief imposed by Section 706(g), that was the only issue before it (slip op. 27). The Court thus did not limit the ways that nonminority plaintiffs may challenge the employer's actions under Section 703 or the Fourteenth Amendment. Indeed, it clearly stated that it was not deciding one of the critical issues in the present case—"what showing [an] employer would be required to make concerning prior discrimination on its part against minorities in order to defeat a challenge by nonminority employees based on § 703" (slip op. 14 n.8).

It would, after all, be rather surprising if an employee's rights under Title VII could be waived without his consent by his employer, unilaterally or in concert with other employees or litigants (see *Fire-*

Moreover, the rule that affirmative action programs must be directed at an employer's own discriminatory practices and demand his self-evaluation is an essential ingredient in striking a proper balance between the compensatory and nondiscrimination objectives of Title VII. The absence of discriminatory practices by a particular employer wholly negates the primary justification for permitting voluntary, class-based affirmative action programs, *i.e.*, a voluntary resolution of charges of discrimination. As this Court has noted, an employer's dual responsibilities of eliminating all "discrimination based on race" (*Palmore* v. *Sidoti*, 466 U.S. 429, 432 (1984)), and remedying past discrimination "are not always harmonious"; such competing interests are sometimes best resolved without hostile litigation if the employer "act[s] with extraordinary care" (*Wygant*, slip op. 8). Cf. *Weber*, 443 U.S. at 209-211 (Blackmun, J., concurring). If, however, there is an insufficient basis for concluding that discrimination has occurred—and thus no serious threat of litigation exists—there are no competing demands to reconcile and no need for any settlement of discrimination charges, voluntary or otherwise. The employer is not on the "tightrope" of seeking to resolve discrimination claims by minority employees without engendering such future claims by nonminority employees whose employment opportunities are infringed.

Accordingly, a rule that permits an employer to engage in class-based preferential treatment absent any tension

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fighters v. *Cleveland*, slip op. 1 (White, J., dissenting) ("An employer may not, without violating Title VII, simply decide for itself or in agreement with its employees to have a racially balanced work force and displace employees of any race to make room for employees of another race."); see also *W. R. Grace & Co.* v. *Rubber Workers*, 461 U.S. 757, 770-772 (1983); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 51-52 (1974) ("there can be no prospective waiver of an employee's rights under Title VII")). Title VII's principal aim is to end discrimination, not to end law suits, and the aim of voluntary compliance cannot override this more basic goal. Nor will settlements be encouraged by allowing the employer greater leeway in voluntary plans than a court has in ordering compliance: The *nonminority* employee will always be encouraged to bring the dispute into court if refusing to settle reduces the possibility of an adverse result for him.

engendered by past discrimination has the perverse result of authorizing an employer that has never engaged in discriminatory practices to now, for the first time, embark on such an invidious course. This creation of a new class of victims of discrimination, where none before existed, cannot even arguably be reconciled with the statutory objectives of Title VII. In such circumstances, it is evident that *any* "trameling" of the interests of nonminority employees is wholly "unnecessary." See *Weber*, 443 U.S. at 208.

D. The Decision Below Should Be Reversed Because Respondent Failed To Show That Its Plan Was Remedial Or Narrowly Tailored

Neither court below applied the proper framework to this case. Neither recognized the threshold importance of a showing by the employer that its plan was remedial; nor did they consider fully the relevant factors determining whether a plan is narrowly tailored. We believe the record is quite convincing that respondent's plan was not remedial, *and* that it was not narrowly tailored. Since there is not and hardly could be any dispute that petitioner was discriminated against, and because the burden was then on respondent to demonstrate that its plan was valid and it did not do so, reversal is appropriate. Nonetheless, given the fact that neither court applied the correct standard, and given the clarifications by this Court in the last term and any clarification the Court might propose now, the Court may wish to remand the case to allow respondent to develop and the courts below to evaluate the facts in accordance with the proper considerations.

1. While the district court stated that it did "not feel that * * * the plans were adopted to break down 'old patterns of segregation and hierarchy,'" and found as fact that respondent has not and does not discriminate against women, it also said that this holding was "not critical, because [the court's] decision is not based on a failure to carry that portion of [respondent's] burden" (Pet. App. 9a-10a, 13a). The court of appeals, on the other hand, found that, "[i]n order to demonstrate that its plan is remedial, an employer need not show its own

history of purposeful discrimination. It is sufficient for the employer to show a conspicuous imbalance in its work force" (*id.* at 26a (footnote and citation omitted)).

Neither court, therefore, gave serious consideration to this most important threshold inquiry regarding the plan's remedial nature. Indeed, in our view the record is convincing that the plan was not remedial. As discussed at pages 25-26, *infra*, the "statistical imbalance" asserted in this case is misleading and, even if an imbalance did exist, that simple fact alone would neither establish a prima facie case of sex discrimination against respondent, nor, taken in isolation, would it be sufficient to justify the use of a class conscious affirmative action plan. It is, of course, true that "[w]here gross statistical disparities can be shown, they may in a proper case constitute prima facie proof of a pattern or practice of discrimination," but a disparity depends on a comparison between the make-up of a particular segment of an employer's work force and the relevant qualified labor pool. *Hazelwood School District* v. *United States*, 433 U.S. 299, 307-308 (1977); *id.* at 347-348 (White, J., concurring); *Dothard* v. *Rawlinson*, 433 U.S. 321, 348-349 (1977) (White, J., dissenting). See also *New York Transit Authority* v. *Beazer*, 440 U.S. 568, 584-587 (1979). In the court below there was no discussion of this or any other method of proving discrimination. There was no showing of the percentage of qualified females, nor, indeed, of what the relevant labor market was. See *Wygant*, slip op. 6 (plurality opinion); see also *id.* at 11 (opinion of O'Connor, J.); *Teamsters*, 431 U.S. at 339-340 n.20.[13]

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[13] Applicant data are especially important in the gender discrimination context. Due to a variety of reasons unrelated to discrimination, men and women simply do not apply for jobs in the same proportions. See England, *Explanations of Job Segregation and the Sex Gap in Pay* 54, 55; Berger, *Comparable Worth at Odds with American Realities* 65, 67-69; O'Neill, *An Argument Against Comparable Worth* 177, 181; and Polacheck, *Women in the Economy: Perspectives on Gender Inequality* 34, 46, 49-50, in U.S. Comm'n on Civil Rights, *Comparable Worth: Issue for the 80's* (1984). Cf. *Sheet Metal Workers*, slip op. 6 (O'Connor, J., concurring in part and dissenting in part) ("[I]t is completely unrealistic to assume that

More fundamentally, the affirmative action plan itself does not purport to be designed to redress past discrimination. Both the terms and the structure of the plan indicate that it is designed to manipulate the numerical balance of the workforce with respect to a variety of ethnic, racial, and physical (as well as gender) criteria, rather than to remedy any particular "statistical imbalance" which might have been indicative of discrimination. Thus, the Agency's December 1978 plan states as its first "Long-Range Employment Goal[]" "a work force whose composition in all job levels and major job classifications approximates the distribution of women, minority and handicapped persons in the Santa Clara County workforce" (J.A. 54, 120-121). The County October 1979 and the County and Agency 1982 plans repeat this objective in substance (J.A. 35, 120-121, 132-133; S.E.R. 170). In pursuit of proportional representation, the County established finely-tuned, comprehensive "long-range employment goals" for women and for five racial or ethnic groups based on their proportions in the area labor force.[14] In 1981, minor adjustments were made.[15] Yearly

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individuals of each race will gravitate with mathematical exactitude to each employer or union absent unlawful discrimination. That, of course, is why there must be a substantial statistical disparity between the composition of an employer's work force and the relevant labor pool, or the general population, before an intent to discriminate may be inferred from such a disparity. *Teamsters* v. *United States*, 431 U.S. 324, 339-340, and n.20 (1977).").

[14] Women were to constitute 36.4% of the labor force, blacks 1.6%, Hispanics 14.8%, Asians 2.3%, American Indians .4%, and Filipinos .6% (J.A. 44-46). As the plurality noted in *Wygant*, the inclusion of so many groups in a plan illustrates its improperly undifferentiated nature (slip op. 15 n.13). We submit that it also casts doubt on the plan's remedial objective. Cf. *Fullilove*, 448 U.S. at 530 n.12 (Stewart, J., dissenting) ("In today's society, it constitutes far too gross an over-simplification to assume that every single Negro, Spanish-speaking citizen, Oriental, Eskimo, and Aleut * * * currently suffers from the effects of past or present racial discrimination").

[15] The category for Filipinos was dropped; they may have been included in the "Hispanic" goal (S.E.R. 185). The goal for Asians was adjusted to 2.9% (although workforce data were unavailable),

preferential goals are established for any of these groups which are underrepresented based on a "Utilization Analysis" (see, *e.g.*, S.E.R. 186). That the plan's purpose hardly seems directed at remedying discrimination (or even at correcting gross statistical disparities) is reflected in the fact that, when the County embarked on the 1978 plan, "the overall representation in the Agency workforce of each minority group *approximated or exceeded* its ratio in the area work force" (J.A. 46-47 (emphasis added)). Moreover, the majority of these groups appear to have been overrepresented in *most* job categories, including several of the apparently most desirable.[16] By the time the 1982 plan continued the required long range goals and workforce analysis, the representation of these groups had apparently *increased*.[17] And as applied to women, the designation of jobs categories—including the category involved in this case, where the statistical disparity on the surface is asserted to be so striking—seems so arbitrary and susceptible to meaningless manipulation as hardly to serve as the basis for the discrimination it was supposed to justify.[18]

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and a new 6.5% goal was added for handicapped individuals (*id.* at 209).

[16] Of the seven job categories, blacks were apparently overrepresented in five, including professionals, technicians, and skilled craft workers; Hispanics were overrepresented in two and almost proportionately represented in two more; Asians were overrepresented in three, including professionals and technicians; American Indians were overrepresented in four, including officials and administrators and skilled craft workers; and Filipinos were overrepresented in five, including professionals, technicians, and skilled craft workers (S.E.R. 61).

[17] The 1982 plan (S.E.R. 209) indicates that blacks and American Indians had achieved parity or overrepresentation in *all* categories, Asians in all but one, and Hispanics in all but three.

[18] When compared to gross workforce statistics, women have been somewhat underrepresented in the workforce as a whole (approximately 22-23% versus 36.4% in the labor force), although they were overrepresented in the clerical and paraprofessional categories (J.A. 49, 53; S.E.R. 209). But even with respect to the promotion at issue, it is not clear that the preference remedies underrepresentation in any meaningful sense. The position here

If the case is remanded rather than simply reversed, respondent should be required to show "sufficient evidence to justify the conclusion that there has been prior discrimination" (*Wygant*, slip op. 9 (plurality opinion)) of sufficient severity to justify a program of affirmative, class-conscious relief benefiting non-victims.

2. Just as—indeed, *because*—there has been no discussion of prior discrimination, there has also been no adequate consideration of whether the affirmative action plan, as it actually operates, is a narrowly tailored response to that identified problem. Nonetheless, evidence in the current record regarding the apparent permanence of the plan and the fact that it trammeled promotions argue convincingly that the plan was not narrowly tailored.

As to the former, the court of appeals' assertion that, because the plan was not stamped permanent, the court could not conclude that it was permanent, is wholly unconvincing. Rather, given where the burden of proof lies and given that discrimination is to be the exception, not the rule, a plan with no ending mechanism should be presumed not to be temporary.[19]

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was classified as "skilled craft worker," a category in which women were underrepresented, but 33 of 34 similar "dispatcher positions" were classified as clerical (see 1 Tr. 7, 32-33; S.E.R. 202). Women constituted 77.9% of the office and clerical employees in 1981 and thus are overrepresented in that category (S.E.R. 209). Achievement of gender balance through such arbitrary classification can hardly be judged relevant to correcting discrimination.

[19] We note, moreover, that in this case respondent's promoting official testified that the plan *was* permanent. See Pet. App. 7a.

We also note that the plans established long range goals for agency workforce representation in all categories based on area labor force. A "utilization analysis" is conducted each year to determine whether there is underrepresentation; if there is, preferential short term hiring goals are employed (see generally J.A. 61). As we have seen (page 26, *supra*), the 1978 "utilization analysis" revealed that *every* racial and ethnic minority was proportionately represented or overrepresented in respondent's workforce (and in many job categories) prior to the adoption of each of the plans. Yet even as their representation has increased, annual utilization analyses based on the *long range goals* continues. While *short term* goals for preferential hiring or promotion are not employed in particular years when such a group is overrepresented, the

As to the fact that promotion was denied, we think that this also merits reversal. The preference in question (as well as many preferences under the plan) involves a promotion. As with layoffs, such preferences generally "impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption with their lives" (*Wygant*, slip op. 15 (opinion of Powell, J.)). A person who has invested his time and effort in a job and often has made great sacrifices with the hope and expectation of advancing in his job (particularly in the context of careers in public service where long service and regular advancement are the rule) has a far greater interest than an individual applying for an entry level position.[20] Eligibility for promotion is a major part of the "equity" in seniority built up by an employee. See *Wygant*, slip op. 14 (opinion of Powell, J.); Fallon & Weiler, *Conflicting Models of Racial Justice*, 1984 S. Ct. Rev. 1, 58, 67. See also *Franks*, 424 U.S. at 787 (opinion of Powell, J.) ("consideration for promo-

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"utilization analyses" conducted long after parity has been reached suggests that such goals will be used if any of these groups drops below proportional representation.

The 1982 plan also provides that "[p]rojections and goals will be clearly defined each year" for various groups (J.A. 141; S.E.R. 177). This process continues for each job category (*ibid.*), although two of these groups were proportionately or over-represented in all job categories (see S.E.R. 209). Additionally, even if the goals did end upon elimination of statistical imbalances, it is by no means clear that the plan would be "temporary." For example, as of October 31, 1981, six of 349 skilled craft workers were women and the goal is 36.4% or 127 (S.E.R. 209). Unfortunately, we know of no projections for the rate of replacement of these workers in the record. If, however, one were to assume that there would be 5% *all male* attrition rate per year (and neither creation of new jobs nor layoffs), even a 50% female quota would not enable respondent to meet its goal for almost fifteen years. Of course, if for whatever reason respondent does not have sufficient numbers of qualified female applicants to fill the jobs in those proportions, the plan would operate considerably longer.

[20] It should always be borne in mind, however, that under Title VII any employee has an expectation that he will not be penalized because of his race or gender.

tion" an element of competitive seniority).[21] Indeed, the facts of this case appear to illustrate the damage that a discriminatory denial of a promotion can do. Petitioner voluntarily requested a demotion to the maintenance department because he thought he would have a better chance of advancement to a more senior maintenance position, or to dispatcher (1 Tr. 127). The burden of the preferential promotion challenged in this case thus fell entirely on one person—a fifty-four year old employee with more than thirty years of experience who had taken a substantial career risk to pursue a promotion, and who had earned that promotion under respondent's merit criteria (*id.* at 125-129). The high price petitioner has had to pay in pursuit of gender balance cannot be diffused among anyone else.[22]

If the case is remanded rather than simply reversed, respondent should state precisely what it is that it is seeking to remedy, and explain why gender discrimination in favor of nonvictims, and not some less disfavored approach, is necessary to that end. We note that the district court did not discuss, other than in describing the events of this case, the ways in which the plan and its work force goals were involved in specific hiring and promotion decisions. A better understanding of the plan in its concrete operation would be relevant to whether there was indeed narrow tailoring here. Evidence should be received on the influence that the numerical objectives

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[21] The training program in *Weber*, conversely, did not even exist prior to the affirmative action plan (443 U.S. at 198).

[22] Nor, apparently, are white males the only persons who will suffer disadvantage under the plan. As we have seen, yearly hiring and promotion goals are employed to fill positions in job categories in which the various protected groups are underrepresented. But short-term goals are not required for groups which, at the same time, may be proportionately represented or overrepresented (see, *e.g.*, 2 Tr. 242-243). Thus—with respect to the job category at issue here, skilled craft workers, as of October 31, 1981—females could receive preference not only over male whites but over male Hispanics, blacks, Asians, and American Indians (all of whom were proportionately or overrepresented in this category (S.E.R. 209). Indeed, under the plan members of these groups may be both the bene-

actually had on hiring and promotion decisions. In this regard, the court of appeals' attempt to draw conclusions simply from the language of the written plan is completely inadequate (Pet. App. 28a-29a). Plans such as this one, and such as currently exist in the files of thousands of public and private employers across the country, may be interpreted and applied in ways which range from the wholly innocuous to the wholly impermissible.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted.

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AUGUST 1986

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ficiaries and the victims of discrimination, depending on how the statistics jibe in specific years. See generally J.A. 61-65.

As we argued in *Wygant* (U.S. Br. at 19), different affirmative action plans often discriminate in favor of and against the very same minority groups. The statute in *Fullilove* gave a preference to all Spanish-speaking citizens (see 448 U.S. at 459); by contrast, the admissions program in *Bakke* favored only "Chicanos," *i.e.*, Mexican Americans, while all other Hispanics, including such groups as Puerto Ricans, Cubans, and Central Americans, were required to shoulder part of the burden of providing compensation (see 438 U.S. at 274). The instant plan is apparently another example of this phenomenon, since it could itself require discrimination for and against a particular group in alternate years, depending on the annual "utilization analyses."

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In The

Supreme Court of the United States

October Term, 1986

PAUL E. JOHNSON,

Petitioner,

v.

TRANSPORTATION AGENCY, SANTA CLARA COUNTY, CALIFORNIA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

[redacted] **BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, WILLIAM KIDD, AND EDWARD SWIDEN IN SUPPORT OF PETITIONER**

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Orwell, Nineteen Eighty-Four in Orwell's Nineteen Eighty-Four: Text, Sources, Criticism 135 (1963) 19

W. Shakespeare, Romeo and Juliet, Act II, Scene ii, Lines 42-43 7

No. 85-1129

In The

Supreme Court of the United States

October Term, 1986

PAUL E. JOHNSON,

Petitioner,

v.

TRANSPORTATION AGENCY, SANTA CLARA COUNTY, CALIFORNIA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, WILLIAM KIDD, AND EDWARD SWIDEN IN SUPPORT OF PETITIONER

This motion of William Kidd, Edward Swiden, and Pacific Legal Foundation for leave to file the annexed brief amicus curiae is respectfully made pursuant to Supreme Court Rule No. 36. Consent to the filing of this brief has been granted by counsel for petitioner; this consent has been lodged with the clerk of this Court. Consent has been withheld by counsel for respondent, Transportation Agency, Santa Clara County, California.

William Kidd and Edward Swiden are candidates for employment with the California Department of Fish and Game. In a manner similar to the Transportation Agency of Santa Clara County's 1978 affirmative action plan, the State of California has employed race and gender preferences in employment. California has attempted to justify these preferences as a step to eliminate race and gender imbalances not caused by discrimination. William Kidd and Edward Swiden have filed suit in California Superior Court to challenge the discrimination against them. The action is still pending. William Kidd and Edward Swiden have an interest in the outcome of the case before the Court because resolution of the issues will affect their rights against the State of California.

Pacific Legal Foundation is a nonprofit, tax-exempt corporation, incorporated under the laws of California for the purpose of participating in litigation affecting public policy. Policy of the Foundation is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. The Board of Trustees evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. The Foundation's Board of Trustees has authorized the filing of a brief amicus curiae in this matter.

Pacific Legal Foundation has participated in several cases which involved issues similar to that presented in this case. The Foundation's public policy perspective and litigation experience in support of individual liberties will help provide this Court with additional argument in light of the erroneous holding of the Ninth Circuit Court of Appeals in this matter.

For the foregoing reasons, William Kidd, Edward Swiden, and Pacific Legal Foundation request that the motion to file the annexed brief amicus curiae be granted.

DATED: August, 1986.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, WILLIAM KIDD, AND EDWARD SWIDEN IN SUPPORT OF PETITIONER

INTERESTS OF AMICI

The interests of amici are set forth in the preceding motion for leave to file brief amicus curiae of Pacific Legal Foundation, William Kidd, and Edward Swiden in support of petitioner.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 770 F.2d 752 (9th Cir. 1985).

———o———

STATEMENT OF THE CASE

Petitioner, Paul Johnson, was an applicant for a promotion by his employer, respondent, Transportation Agency of Santa Clara County, California (Agency). The Agency did not promote petitioner, but promoted Diane Joyce instead pursuant to the Agency's 1978 affirmative action plan. Petitioner filed suit for redress of a violation of Title VII's prohibition on sex discrimination.

The District Court held that petitioner was denied the promotion because of his sex and that Joyce was promoted because of her sex. The parties agreed that the competitive examinations which ranked petitioner higher than Joyce were fair.

The District Court held that the affirmative action plan was invalid because it was not designed to remedy past discrimination. The court held as a matter of fact that the Agency had not discriminated against women. Furthermore, the court found that the plan was illegal because the Agency had failed to prove that the plan was temporary. The plan had no termination date, yearly reviews were never conducted, and testimony of the Agency's

director indicated that the plan was intended to be permanent. The court also held that the Agency's actions unnecessarily trammeled the petitioner's interests and had the effect of an absolute bar to promotion. The court ruled for petitioner and the Agency appealed.

The Ninth Circuit Court of Appeals reversed. The court stated that an affirmative action plan need not be preceded by past discrimination to constitute a defense to a Title VII violation, but race and gender preferences may be imposed to achieve a race and gender balance of the employer's work force similar to the proportion in the area work force. The Court of Appeals also ruled that the plan was temporary because the purpose of the plan was to "attain" labor force parity and not to maintain balances. Furthermore, the court ruled that a pattern of exclusion of white males must be shown in order to prove that an affirmative action plan creates an absolute bar to advancement of males.

The petitioner petitioned this Court for a writ of certiorari. The petition was granted on July 7, 1986.

———o———

SUMMARY OF ARGUMENT

The trial court found that the petitioner was not promoted by the Agency because of his gender, a reason prohibited by Title VII. However, this Court created an exception to the ban on discriminatory treatment by employers if the action is pursuant to an affirmative action plan which contains safeguards similar to those in *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979).

The name "affirmative action" should not preclude a search for the substance and practical effect of the plan. Just as "a rose by any other name would smell as sweet," sex and race discrimination labeled affirmative action is as repulsive as historical segregation. W. Shakespeare, *Romeo and Juliet,* Act II, Scene ii, Lines 42-43. Only affirmative action plans which contain the protections and limits found in *Weber* should constitute a defense to otherwise indefensible discrimination.

Those safeguards include the requirements that the plan be designed to remedy present effects of past discrimination, be temporary and not designed to maintain race balances, and not allow an unnecessary trammeling of the interests of nonminority employees. The trial court specifically found as matters of fact that there was no past discrimination to remedy, that the plan was not temporary, and that the petitioner's interests were trammeled. The Court of Appeals' disregard of the need for past discrimination ignores the limits of this judicially created exception to Title VII. The reversal of the finding of fact regarding temporariness was also inappropriate. Finally, the Agency's affirmative action plan contains no constraints to protect the interests of nonpreferred workers, but rather encourages discriminatory treatment. Thus, the plan unnecessarily trammels the interests of male employees. Although the absence of any one of *Weber's* requirements would preclude use of the plan as a defense, none of the safeguards of *Weber* are present in this case.

———o———

ARGUMENT

I

THE NINTH CIRCUIT ERRONEOUSLY HELD THAT THE AGENCY'S AFFIRMATIVE ACTION PLAN WAS REMEDIAL

Although a sex or race based promotion decision appears to be in conflict with Title VII's ban on discrimination, such a decision may be legitimate if made pursuant to an affirmative action plan which falls within the guidelines set by this Court in *United Steelworkers of America v. Weber*, 443 U.S. 193. The first saving grace of the race preference in *Weber* was that it was "designed to break down old patterns of racial segregation and hierarchy. Both [Title VII and the affirmative action plan] were structured to 'open employment opportunities for Negroes in occupations which have been traditionally closed to them.'" *Weber*, 443 U.S. at 208 (quoting 110 Cong. Rec. 6548 (1964) (remarks of Senator Humphrey)).

This requirement assumes several conditions. First, that the employer had been responsible for "racial segregation and hierarchy" and that employment opportunities were "traditionally closed." *Id.* Second, the requirement assumes that the hierarchy and segregation resulting from past discrimination is still in existence and that a race or sex preference is necessary to eliminate the vestiges of past discrimination. The fatal flaw in the Court of Appeals' decision is the presumption that race or gender preferences may be used to eliminate imbalances whether or not they are the result of discrimination. If the imbalances are not caused by prior discrimination, any attempt to eliminate those imbalances cannot be remedial.

The District Court held in its Findings of Fact that "[t]he Transportation Agency has not discriminated in the past, and does not discriminate in the present against women in regard to employment opportunities in general and promotions in particular." Appendix to Petitioner's Petition for Writ of Certiorari (Appendix to Petition) at 13a, Paragraph No. 22. Certainly, that finding is inconsistent with a claim that any employment opportunity was "traditionally closed" to women. Without past discrimination, there is nothing to remedy.

Respondent argues that the statistical gender imbalance needed a remedy. *See* Respondent's Brief in Opposition to Petition for a Writ of Certiorari at 4. Likewise, the Court of Appeals stated:

> "Statistics are extremely useful in showing a conspicuous work force imbalance. We note particularly the difficulty that may confront an employer whose plan is intended to remedy discrimination resulting from societal norms. Some forms of discrimination are so subtle or so accepted that they defy proof other than by statistics." *Johnson v. Transportation Agency*, 770 F.2d at 758.

The Court of Appeals suggests that an employer may discriminate in order to "remedy discrimination resulting from societal norms." *Id.* The court stated that "the district court's factual finding of no past or present discrimination against women by this employer is irrelevant to the issue of the validity of the affirmative action program." *Id.* at 758 n.4.

Such an interpretation eliminates the need for the preferences to be remedial. For constitutional purposes

not present in this case, "[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy." *Wygant v. Jackson Board of Education,* — U.S. —, 90 L. Ed. 2d 260, 270 (1986) (Powell, J.); *id.* at 277-78 (O'Connor, J., concurring). Although a Fourteenth Amendment challenge was not made in the present case, Title VII should not be construed so as to attempt to justify a constitutional violation.

This Court's decision in *Wygant* relied on *Hazelwood School District v. United States,* 433 U.S. 299 (1977), a Title VII case. *Wygant,* 90 L. Ed. 2d at 269. Statistical disparity may be evidence of prior discrimination and "gross statistical disparities . . . may in a proper case constitute prima facie proof of a pattern or practice of discrimination." *Hazelwood,* 433 U.S. at 307-08 (citing *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 339 (1977)). But statistical disparity is evidence of, not a substitute for, prior discrimination. In the present case, the trier of fact below concluded after reviewing all the testimony and evidence that, despite the imbalance, no prior discrimination existed. Furthermore, the Agency's plan states that "few women seek entry into [certain] positions" because of the "heavy labor" involved. Transportation Agency, County of Santa Clara, *Equal Employment Opportunity Affirmative Action Plan* at 16 (1978). It is unfair to prefer the few women who seek these positions merely because few women chose that walk of life. The Court of Appeals erroneously mistook a part of the evidence for the required conclusion.

Furthermore, this Court recently reaffirmed the Title VII requirement that race conscious employment practices must be remedial in *Local 28 of the Sheet Metal Workers'*

International Association v. Equal Employment Opportunity Commission, — U.S. —, 54 U.S.L.W. 4984 (July 2, 1986).

> "We have previously suggested that courts may utilize certain kinds of racial preferences to remedy past discrimination under Title VII. . . . The Courts of Appeals have unanimously agreed that racial preferences may be used, in appropriate cases, to remedy past discrimination under Title VII." *Id.* at 4991-92 (footnote omitted).

No past discrimination exists in this case.

The Court's companion decision in *Local No. 93, International Association of Firefighters v. Cleveland,* —U.S. —, 54 U.S.L.W. 5005 (July 2, 1986), does not eliminate the predicate of prior discrimination because the race preferences were voluntarily assumed by the employer, rather than court imposed. The Court specifically warned that

> "[t]his is not to say that the parties may agree to take action that conflicts with or violates the statute upon which the complaint was based . . . . [T]he fact that the parties have consented to the relief contained in a decree does not render their action immune from attack on the ground that it violates § 703 of Title VII . . . ." *Id.* at 5012.

Cleveland does not stand for the proposition that voluntary affirmative action is in any way exempt from the basic prohibitions on discrimination in the statute. "[W]e do not suggest that voluntary action by employers or unions is outside the ambit of Title VII . . . . The rights of nonminorities with respect to action by their employers are delineated in § 703 of Title VII." *Id.* at 18 n.11; *see also id.* at 5013 (O'Connor, J., concurring). The Court specifically addressed the limited issue of whether a consent decree is

subject to the limitations on court ordered relief in Section 706(g) of Title VII. 42 U.S.C. § 2000e-5(g). Unlike the *Cleveland* case, the petitioner is challenging the gender preference as a violation of Section 703 of Title VII. 42 U.S.C. § 2000e-2.

Various lower courts have not allowed the label of "affirmative action plan" to resolve the issue. In *Lilly v. City of Beckley,* 615 F. Supp. 137, 140 (W. Va. 1985), the court found that an affirmative action plan which was not for the purpose of remedying past discrimination did not justify suspect preferences. The court in *Janowiak v. City of South Bend,* 750 F.2d 557 (7th Cir. 1984), *petition for cert. filed,* 55 U.S.L.W. 3039 (June 10, 1985) (No. 84-1936), interpreted *Weber* to require past discrimination to justify race preferences. Statistical disparity is not enough. *Id.* at 563.

Title VII will justify race and gender preferences only if they are part of the plan designed to remedy a Title VII violation. Statistical imbalance is not a violation of Title VII. *See* 42 U.S.C. § 2000e-2(j). The trier of fact found no prior discrimination. It is important to remember that Title VII prohibits discrimination on the basis of race or sex and the prohibition protects nonminorities "upon the same standards" as minorities. *McDonald v. Santa Fe Trail Transportation Co.,* 427 U.S. 273, 281 (1976). In *Weber* the Court created a limited exception because of the compelling interest in eliminating the lingering effects of the once closed doors of opportunity. Without any past discrimination, the compelling reason for the exception does not exist and the general rule of nondiscrimination should apply. Hence, the lack of a remedial purpose renders the respondent's race and sex preferences violative of Title VII.

II

THE NINTH CIRCUIT ERRONEOUSLY HELD THAT THE AGENCY'S AFFIRMATIVE ACTION PLAN WAS TEMPORARY

The Ninth Circuit Court of Appeals concluded that "the Agency plan is sufficiently temporary." 770 F.2d at 757. This conclusion is erroneous for several reasons. First, the temporary or indefinite nature of the plan is a question of fact to be determined by the trier of fact, the District Court, and not the Court of Appeals. *Anderson v. City of Bessemer City,* — U.S. —, 84 L. Ed. 2d 518 (1985) (Court of Appeals improperly reversed the trial court's finding of discrimination in violation of Title VII).

In *Anderson* this Court recently explained the "clearly erroneous" standard regarding appellate review of findings of fact.

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Fed. R. Civ. P. 52(a).

The significance of the "clearly erroneous" standard is the extreme strictures it places on a Court of Appeals' ability to reverse findings of fact.

> "If the district court's account of the evidence is plausible in light of the record reviewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson,* 84 L. Ed. 2d at 528.

In the present case, the District Court found that the "Affirmative Action Plan had no end-date *or other provision which would have the effect of ending preferential*

treatment to women." Appendix to Petition at 13a, Paragraph No. 24 (emphasis added).

Although the appellate court's concern over technicalities in drafting is legitimate, the Agency had the opportunity to show the plan's temporary nature when it drafted the plan and at trial. The Agency certainly had the incentive to prove temporariness since the law is clear that race and gender preferences must be temporary. *See Weber*, 443 U.S. at 208; *Johnson*, 770 F.2d at 757. The Agency did not prove that the plan was temporary to the satisfaction of the trier of fact.

The District Court specifically relied on the absence of a termination date for the affirmative action plan and the Agency director's testimony that the plan was intended to be permanent. The trial court's finding that the plan was not temporary is a permissible view of the evidence. The Court of Appeals reversed the finding on the basis that the goal of the plan was to "attain" a gender balance. The court reasoned that the choice of the word "attain" requires an end of the plan upon attainment of the goal. *Johnson*, 770 F.2d at 756-57.

The issue is not whether the Court of Appeals' conclusion is reasonable or more reasonable than that of the trier of fact. Since the trial court's conclusion is supported by the evidence, its finding that the plan was not temporary cannot be clearly erroneous. *Anderson*, 84 L. Ed. 2d at 528.

Second, the Court of Appeals' decision ignores *Weber's* prohibition of a maintenance of race and gender balances. *Weber*, 443 U.S. at 208. Here the court held that

preferences may be used to eliminate imbalances not caused by discrimination. *Johnson*, 770 F.2d at 758 n.4. Preferences to eliminate the present effects of past discrimination operate in the following manner. Preferences are used to reach the appropriate balance and then end. If an imbalance occurs later which is not a result of discrimination, the preferences cannot be reinstated. Otherwise, the employer would be maintaining balances.

If the mere presence of imbalance alone will justify race and gender preferences, an employer may "attain" a balance one year and then an imbalance may recur the next year. The new imbalance under the appellate court's theory would justify suspect preferences again. If this scenario is not a *maintenance* of race and gender balances, then nothing is. The Court of Appeals has almost erased *Weber's* prohibition on the employer's maintaining balance by attempting to justify preferences because of an imbalance not caused by discrimination.

III

THE NINTH CIRCUIT ERRONEOUSLY HELD THAT THE AGENCY'S AFFIRMATIVE ACTION PLAN DOES NOT UNNECESSARILY TRAMMEL THE INTERESTS OF NONPREFERRED EMPLOYEES SUCH AS THE PETITIONER

This Court in *Weber* justified the affirmative action program because the "plan does not unnecessarily trammel the interests of the white employees." 443 U.S. at 208. The Court made clear that a requirement that white employees be laid off to make room for black employees or an

"absolute bar to the advancement of white employees" would violate this test. *Id.* The trial court held that the Agency's affirmative action plan does unnecessarily trammel the petitioner's interests. Appendix to Petition at 14a, Paragraph No. 7.

Whether petitioner was not promoted because of his gender is not an issue in this case. The District Court held as a matter of fact and the Court of Appeals did not disagree, that his gender was the reason he was not promoted, a reason expressly prohibited by Title VII. The issue in this case is whether the Agency's affirmative action plan provides a defense to the otherwise illegal conduct. The validity of an affirmative action plan as a defense to a charge of discrimination depends on the court's review of the plan as a whole and not merely as applied. A narrow review of a plan as applied would never constitute a defense because the focus would be on the person discriminated against such as the petitioner here or the white employees in *Weber*. In order to constitute a defense, the affirmative action plan must be limited in its operation to the purpose of eliminating the vestiges of past discrimination and by procedural constraints similar to those in *Weber*.

The affirmative action plan in *Weber* operated in the following manner. Trainees for the craft training program would be chosen on the basis of seniority. Half of the positions were to be filled by black trainees until the percentage of black skilled craftworkers approximated the percentage of blacks in the community labor force. *Weber*, 443 U.S. at 199. Although the Court's description of the

procedural working of the affirmative action was minimal, it was significantly more specific than the Agency's 64-page affirmative action plan in the present case.

The Agency's plan refers to the goal to "attain a work force which includes in all occupational fields and at all employment levels minorities, women and handicapped persons in numbers consistent with the ratio of these groups in the area work force." Affirmative action plan at 1. Although the Agency's goal is arguably consistent with the goal of the plan in *Weber*, the Agency's plan does not specify to what extent preferences will be given and to what degree nonminority male employees' interests may be trammeled. " 'If there is no meaning in it,' said the King, 'that saves a world of trouble, you know, as we needn't try to find any.' " L. Carroll, *Alice's Adventures in Wonderland* 121 (1966) (Macmillan). Although such imprecision may satisfy the King of Hearts, the Court should demand more specificity if the plan will be a complete defense to gender discrimination.

Instead, the plan depends on "the initiative, imagination and resourcefulness of the Agency Personnel staff" to meet the goals. Affirmative action plan at 9. The plan contains no limits on the degree to which the Agency will give preferences to underrepresented groups. At least the plan in *Weber* was limited to 50% and seniority. The Agency's plan may constitute a reservation of 100% of all promotions to women.

"Absolute discretion, like corruption, marks the beginning of the end of liberty." *New York v. United States*, 342 U.S. 882, 884 (1951) (Cardozo, J., dissenting memorandum). Although an employer must be given discretion

in regard to employment matters, an employer who raises an affirmative action plan in defense of otherwise discriminatory conduct must have a plan which does not encourage discrimination in the exercise of discretion. The Agency's plan fails to limit both discretion and discrimination. The petitioner's and other male employees' interests are caught in the web of this ambiguous plan.

The language of the plan combined with its absence of limits invites race and gender discrimination. The Court has in other contexts disapproved unbridled discretion which encourages discriminatory treatment. *See, e.g., Smith v. Goguen*, 415 U.S. 566, 567 (1974) (flag misuse statute void because of vagueness and not on First Amendment grounds). The vagueness doctrine "requires legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent 'arbitrary and discriminatory enforcement.'" *Id.* at 572-73. *See also Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969) (unbridled discretion of permit giver may lead to discriminatory actions; therefore, ordinance is invalid); *Industrial Union Department v. American Petroleum Institute*, 448 U.S. 607, 685-86 (1980) (Rehnquist, J., concurring) (delegations require some standards which limit agency actions).

The very wording of the plan encourages discrimination and places no limitations on the extent of the sex and race preferences. Unlike the plan in *Weber*, the Agency's plan gives no assurance that male employees' interests will not be unnecessarily trammeled. Hence, the Agency's actions are unjustifiable.

CONCLUSION

In his Principles of Newspeak, George Orwell explained the new vocabulary.

> "No word in the B vocabulary was ideologically neutral. A great many were euphemisms. Such words, for instance, as *joycamp* (forced labor camp) or *Minipax* (Ministry of Peace, i.e., Ministry of War) meant almost the exact opposite of what they appeared to mean." Orwell, *Nineteen Eighty-Four* in *Orwell's Nineteen Eighty-Four: Text, Sources, Criticism* 135 (1963) (emphasis in original).

It is unfortunate that the pleasing phrase of "affirmative action" has often been used to describe a method of discrimination, in a manner similar to the Orwellian B vocabulary. In order to constitute a defense to gender based employment decision, any plan must be limited by more than the label of affirmative action. It must contain the limits the Court recognized in *Weber*.

The Court of Appeals erroneously held that gender imbalance not caused by discrimination was enough to justify new discriminatory treatment of employees. Furthermore, the court improperly reversed the trial court's finding of fact that the plan was not temporary. Finally, the plan in the present case encourages discriminatory hiring practices and places no limits to protect against such discrimination. The plan thus fails to protect the interests of male employees from being caught in the workings of the plan by the initiative, imagination, and resourcefulness of the plan's implementors. Because of these defects, the Agency's affirmative action plan does not provide a defense to the Agency's gender discrimination in violation of

Title VII. Amici urge that the decision of the Ninth Circuit be reversed.

DATED: August, 1986.

Respectfully submitted,

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Respondents

On Writ of *Certiorari* to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* MID-ATLANTIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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BRIEF OF *AMICUS CURIAE* MID-ATLANTIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTERESTS OF *AMICUS*

Pursuant to this Court's Rule 42, Mid-Atlantic Legal Foundation hereby moves this Court for leave to file the attached brief as *amicus curiae*. Consent was secured from counsel for all active parties. Copies of the letters of consent have been filed with this Court.

Mid-Atlantic Legal Foundation is a non-profit, tax exempt corporation organized and existing under the laws of Pennsylvania. It is a public interest law firm which participates in litigation involving matters of broad public interest such as the instant case which is likely to impact in one form or another a substantial portion of the nation's employers and employees.

STATEMENT OF THE CASE

For the sake of brevity *amicus* does not separately set forth its statement of the case but adopts that set forth by the petitioner.

ARGUMENT

I. Key Facts

Respondent, Transportation Agency, Santa Clara County, California (the "Agency") discriminated against petitioner, a male, on the basis of his sex, in favor of a female.

The Agency had never discriminated against females. (Cert. App. 13a, Finding of Fact 22).[1]

The only discrimination of which the Agency was guilty, therefore, was its refusal to promote petitioner in favor of a less qualified female. (Cert. App. 11a-13a, Findings of Fact 9-16, 21). But for her sex, the less qualified female would not have been promoted to Road Dispatcher. (Cert. App. 13a, Finding of Fact 20).

In reversing the District Court, the Court of Appeals did not undertake to disagree with the foregoing facts. Rather, it ignored those facts in favor of the following rationale:

---

1. References to the Appendix to the petition for *certiorari* are referred to as "Cert. App. _____".

References to the Joint Appendix on the merits are referred to as "JA. _____".

> "Plans like this one are usually voluntarily adopted by employers who wish to express and act upon their commitment to social justice."

[*Johnson v. Transportation Agency, Santa Clara County, California*, 770 F2d., at 757.]

II. Unanimity

Amicus suggests that this case presents both the opportunity and necessity of a unanimous opinion of reversal.

In the view of *amicus*, such an opinion will result if prior opinions are given a straight line extrapolation.

More importantly, a unanimous opinion will be highly desirable as a matter of judicial definition, as may be seen by a brief consideration of the opinions of the courts below. Both of those eminent courts have been distracted by fine point debate from attention to the fundamental viewpoints on which the Justices of this Court appear to agree. Chief among them is the point of view that an acceptable affirmative action program, involving at least race classifications, must be predicated upon identifiable evidence of past discrimination which the plan is designed to remedy.[2,3]

---

2. The only possible exception to this conclusion appears to be the single opinion of Justice Stevens dissenting in *Wygant* v. *Jackson Board of Education* in a factual pattern involving racial violence in an educational setting, a pattern far from that presented here. (*See*, ____U.S. ____, ____, 54 U.S.L.W. 4479, 4492 (1986). But see Justice Stevens' statements at 10, *infra*.

3. "[T]he perception of racial classifications as inherently odious stems from a lengthy and tragic history that gender-based classifications do not share." [*University of California Regents* v. *Bakke*, 438 U.S. 265, 303 (1978)]. In any consideration of exceptions to the proscriptions of Title VII, the remedial action permitted, if any be permitted, must bear a direct relationship to the severity of the discriminatory wrong to be remedied. Temptation to sanction action

(Footnote continued)

When the District Court found that the agency had never discriminated on the basis of sex and the Court had before it only a plan which attributed underrepresentation to an historic lack of interest by females in the jobs involved, its inquiry should have ended. [4]

Similarly, it is quite clear that the Court of Appeals incorrectly read *Weber* as an open door to the exercise by any employer of its view of social justice, the plain language of Title VII and the true underpinnings of *Weber* be damned.[5]

III. The Relevant Precedents

A. This Court's inquiry will unquestionably begin with the plain language of Section 703 [42 U.S.C. Sec. 2000e-2], which proscribes discrimination based on race or sex, *inter alia*. This Court has acknowledged that the proscription is of discrimination against both non-whites and whites with respect to race and both males and females with respect to sex. [*McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976)].

A significant minority of this Court has held to the view that this should end the inquiry. [*Steelworkers* v. *Weber*, 443 U.S. 193, 228 (1979) (Rehnquist, J., dissenting), 443 U.S. 193, 218 (Burger, C.J., dissenting)].

Particularly when presented with a record in which the only allegation of discrimination is of that practiced against the petitioner, the literal language of Section 703 should be deemed to apply without further debate. Section 703 prohibits discrimination, discrimination occurred, no countervailing discrimination appears and in

(Footnote continued)
designed to remedy centuries of invidious and odious race discrimination should be tamed where non-race based classifications are involved. And, of course, in this case there was no past discrimination to remedy. (Cert. App. 13a, Finding of Fact 22).

4. The "plan" discussed herein is the Agency's Affirmative Action Plan set forth at JA. 29-109.

5. *United Steelworkers of America, AFL-CIO-CLC v. Weber*, 443 U.S. 193 (1979).

fact was held not to have occurred. In the view of *amicus* no further search beyond the confines of 703 should be deemed either necessary or justified.

B. This Court has declared that under certain circumstances an employer may employ race-based classifications as part of an affirmative action plan. [*Steelworkers* v. *Weber*, 443 U.S. 193 (1979)].[6]

It has not yet defined in detail the boundaries of such permissible plans. [Id., 443 U.S., at 208].[7]

A second minority of this Court has clearly stated in *Weber*, and subsequent cases involving affirmative action by agreement and court order, that to be acceptable, affirmative action based on race-based classifications, must be predicated upon convincing evidence of past discrimination which the affirmative action is designed to remedy. [*Weber*, 443 U.S., at 213 (1979) (Blackmun, J., concurring); No. 93, *International Assocation of Firefighters, AFL-CIO* v. *The City of Cleveland*, ___ U.S. ___, ___, 54 U.S.L.W. 5005, 5013 (1986) (White, J., dissenting); *Wygant* v. *Jackson Board of Education*, ___ U.S. ___, ___, 54 U.S.L.W. 4479, 4481 (1986) (Powell, J., for the Court); 54 U.S.L.W., at 4484-85 (O'Connor, J. concurring)].[8]

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6. *Amicus* respectfully questions the judicial logic of permitting an employer-citizen greater leeway than that provided to the courts by Congress, under a statute of proscription against employer discrimination.

7. Given the sort of result presented by the case at bar where direct, one-on-one discrimination would be allowed by a Court of Appeals because it perceives that affirmative action plans are adopted for the benefit of social justice, *amicus* suggests that this Court should clarify the holding of *Weber*. Please also see text, *infra* at 13-14.

8. *Amicus* recognizes that the case presents a Title VII claim, but urges that under the facts of the case and the philosophies cited, the distinction between such a claim and an equal protection claim is one without a difference. Whether the requisite evidentiary standard of "convincing" evidence be applied in Title VII statutory cases, or some lesser standard, in no event do the decisions of this Court

(Footnote continued)

Indeed, for affirmative action using race-based classifications to be acceptable, a state employer must be found to be truly remedying its own past discrimination, if not a specific act of discrimination. [*Wygant*, 54 U.S.L.W., at 4485 (O'Connor, J., concurring), *Firefighters*, 54 U.S.L.W., at 5013 (White, J., dissenting)].

The majority of the Court in *Wygant* expressly reaffirmed its rejection of the notion that mere societal discrimination would justify affirmative action by use of race-based classifications. As Justice Powell stated for the Court:

> "This Court never has held that societal discrimination alone is sufficient to justify a racial classification. Rather, the Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination."

(*Wygant*, 54 U.S.L.W., at 4481 (plur. op.); *see also*, *Bakke*, 438 U.S., at 311-315 (1979).

In *Weber*, the permitted employer activity was grounded in a long-standing intentional exclusion of blacks from crafts and craft training programs, an odious practice denounced in so many judicial decisions as to make such exclusion a proper subject of judicial notice. (*Weber*, 443 U.S., at 198 n. 1).

In *Firefighters*, this Court was presented with action taken after long and repeated litigation against the City of Cleveland resulting in judicial findings of wide patterns and practices of race discrimination against its potential civil servants. [*Firefighters*, ____ U.S. ____, ____, 54 U.S. L.W. 5005, 5006 (1986)].

(Footnote continued)
remotely suggest that the necessary predicate may be found in the negative finding that no past discrimination had occurred. (*See also*, *Firefighters*, 54 U.S.L.W., at 5013) (White, J., dissenting).

This Court was presented in *Wygant* with no more than statistical disparities, styled societal discrimination, and a desire on the part of the employer to establish educational "role models."[9] A majority of this Court rejected the planned action, reaffirming the necessity that the action must be based on convincing evidence that it was designed to remedy past discrimination. Even there, however, the rejected action was grounded in "racial tension" to the point of violence. [*Wygant*, 54 U.S.L.W., at 4480 (plur. op.); 54 U.S.L.W., at 4488 (Marshall, J., dissenting)].

By comparison, the instant case does not present the issue of race discrimination but sex discrimination; it does not present any evidence of past sex discrimination, let alone convincing evidence, but presents findings of fact that the employer never engaged in sex discrimination; it does not present any evidence of compelling or any like level of state interest in remedying past discrimination because there was none.

All that is presented is a public agency's viewpoint of societal justice which would allow first, the frustration of a man's career in favor of the de-humanizing concept that its workforce must ape anonymous statistics, and second, the frustration of Congress' view of social justice as reflected in Title VII and its legislative history.

C. A third minority of this Court appears more disposed toward voluntary affirmative actions. As will be seen, however, these Justices retain their commitment

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9. Although some Justices of this Court have apparently taken the position that it is not a necessary predicate for a valid affirmative action plan that specific prior discrimination have been shown, no Justice has taken the position that mere statistical imbalances are sufficient. The Ninth Circuit majority was wrong when it held that "a mere statistical disparity suffices to show that a job category was 'traditionally segregated'." (*Johnson v. Transportation Agency, Santa Clara County, California*, 770 F 2d., at 764, n. 1).

to fundamental principles at direct odds with approval of respondent's plan here and with the Court of Appeals' approach.

The major premise of Justice Brennan's opinion in *Weber* was that "because blacks had long been excluded from craft unions, few were able to present experience credentials required of the employer there." (443 U.S., at 198). Justice Brennan read the totality of Title VII to encourage the elimination of "an unfortunate and ignominious page in our country's history." [443 U.S., at 204, citing *Albemarle Paper Co. v. Moody*, 442 U.S. 405, 418 (1975)].

The signifance with respect to this case, of Justice Brennan's premises in *Weber*, was recently highlighted by his explanation of certain legislative history of Title VII, *viz.*:

> ". . . it is clear that the bill's supporters only wished to emphasize that an employer would not violate the statute merely by having a racially imbalanced work force, and, consequently, that a court could not order an employer to adopt racial preferences merely to correct such an imbalance."

[*Local 28, Sheet Metal Workers International Association* v. *E.E.O.C.*, ____ U.S. ____, ____, 54 U.S.L.W. 4984, 4992 (1986)].

Similarly, in his dissent in *Wygant*, Justice Marshall, in urging the propriety of the Jackson school system's collectively-bargained layoff plan, was clear in the premises of his argument and in articulation of principles which he thought were held inviolate by the action presented in that case:

> "We need not rely on any general awareness of 'societal discrimination ' . . . [t]he imperative to integrate these public schools was urgent. Racially motivated violence had erupted at the

schools, interfering with all educational objectives."

* * *

"Article XII modified contractual expectations that do not themselves carry any connotation of merit or achievement; it does not interfere with the 'cherished American ethic' of '[f]airness in individual competition,' *Bakke, supra,* at 319, n. 53, depriving individuals of an opportunity that they could be said to deserve."[10]

* * *

"Article XII was forged in the crucible of clashing interests. All of the economic powers of the predominently white teachers' union were brought to bear against those of the elected board, and the processes yielded consensus."

* * *

"The concerns that have prompted some Members of this Court to call for narrowly tailored, perhaps court-ordered, means of achieving racial balance spring from a legitimate fear that racial distinctions will again be used as a means to persecute individuals, while couched in benign phraseology. That fear has given rise to mistrust of those who profess to take remedial action, and concern that any such action 'work the least harm possible to other innocent persons competing for the benefit'."

(____ U.S. ____, ____, 54 U. S. L. W. 4479, 4490-91).

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10. Notwithstanding the action taken against petitioner, the instant plan itself contemplates the necessity of promoting the best qualified individual. (*See, e.g.*, plan provisions at JA. 76-77 and 109.)

In like fashion, Justice Stevens has spoken eloquently of the proper focus on individual equality and the counter productive nature of reverse discrimination.

> "Both Title VI and Title VII express Congress' belief that, in the long struggle to eliminate social prejudice and the effects of prejudice, the principle of *individual* equality without regard to race or religion [or sex], was one on which there could be a 'meeting of the minds' among all . . . and a common national purpose."

[*University of California Regents* v. *Bakke*, 438 U.S. 265, 416 n. 19 (1978) (Justice Stevens dissenting) (insertion supplied)].

> "[T]he basic policy of [Title VII] requires that we focus on fairness to individuals rather than fairness to classes."

[*Los Angeles Dept. of Water & Power*, 435 U.S. 702, 709 (1978)].

> "The ultimate goal must be to eliminate entirely from government decision-making such irrelevant factors as a human being's race [or sex]. The removal of barriers to access to political and economic processes serves that goal. But the creation of new barriers can only frustrate true progress. For as Mr. Justice Powell and Mr. Justice Douglas have perceptively observed, such protective barriers reinforce habitual ways of thinking in terms of classes rather than individuals."

[*Fullilove* v. *Klutznick*, 448 U.S. 448, 547 (1980) (Justice Stevens dissenting) (insertion supplied)].

It will readily be seen that the Justices forming this third minority hold fast to the protection of fundamental principles.

Equally readily will it be seen that the discriminatory action permitted by the court below violates the premises, principles and safeguards which this minority has articulated.

This case does not present a factual pattern of intentional racial exclusion as in *Weber,* or of gender exclusion. This case is not grounded in racial tension and resultant violence. The plan presented in this case, far from the product of the "crucible of clashing interests," is the unilateral product of a single employer's view of social justice. The only remotely relevant information appearing upon the record are statistics of gender imbalance, that very condition which, standing alone as it does here, Justice Brennan has pointed out Congress decided would not constitute discrimination. (*Sheet Metal Workers,* 54 U.S.L.W., at 4992).

What the record does present is action taken pursuant to the plan which collides head-on with, and destroys, the opportunity which the petitioner merited because he had achieved it and which he deserved. It did so by an act of prohibited sex discrimination.[11]

IV. The Plan Is Not Temporary

The instant plan and the discrimination worked against petitioner find no basis in the consistent decisions and opinions of this Court, as shown above. But assuming, *arguendo,* that some action were to be sanctioned despite that law, under, for example, the tests set forth in *Weber,* the Agency's plan fails. One such test is whether a plan is temporary. As the District Court found, "the Affirmative Action Plan had no end date or other

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11. To promote someone less qualified over someone more qualified, is itself an act of discrimination. When the reason for such promotion is grounded in gender, the sin of discrimination is compounded.

provision which would have the effect of ending preferential treatment to women." (Cert. App. 13a, Finding of Fact 24).

The plan in this case seeks not only to attain certain hiring goals, but effectively seeks to maintain those goals into an undefined future. The plan speaks often of the need for "continuing action" with respect to establishing and maintaining the percentages of women and minorities in the Agency's workforce.

Moreover, according to the plan, it will moderate or amend the goals of hiring to comport with changes in the Census data.[12] Thus the plan contemplates continuing changes in its goals to accommodate changes in the demographics of the County work force.

Moreover, as hiring is a continuing process, the plan will operate as a permanent requirement to ensure that the work force during any given time period qualifies with respect to the percentage goals for different groups set by the plan. Even when those goals are achieved, they will need to be continually applied so that the percentages remain constant. The plan is "timeless" in its scope and therefore should not be upheld by this Court. As Justice Powell stated in *Wygant:*

> "But as the basis for imposing discriminatory *legal* remedies that work against innocent people, societal discrimination is insufficient and overexpansive. In the absence of particularized findings, a Court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future." (54 U.S.L.W., at 4482).

---

12. The plan established percentage long-range goals for women and minorities based on the ratio of those groups in the area work force, according to the 1970 Census. The plan further provided, however, that these goals would be modified "in accordance with the data derived from the 1980 Census or other official data that may become available." (JA. 54)

V. Unrealistic Nature of the Plan

This Court should examine the plan closely. It is a document laced with unrealistic premises and demands, styled "goals", particularly with respect to the jobs that were involved and for which it sought to establish a goal of 36.4 percent for women. Many of the jobs admittedly involved "heavy labor." Indeed, certain of the job categories which had to be filled by this goal of 36.4 percent for women, were significantly underrepresented by women because, as the Agency acknowledged in its plan, "few women seek entry into these positions." (JA. 56). For example, women were "greatly underrepresented in the bus maintenance function." (JA. 50). That is, women were not applying and historically had not applied to be bus mechanics. This is not surprising. The lack of women in the heavy labor job categories, such as mechanics and body and fender repairers, was not the result of any discrimination, but rather represents the normal and natural desires and inclinations of women with respect to the types of work they seek.[13] Nevertheless, the instant plan seeks unrealistically to mechanically impose the same representation for each and every kind of job.

VI. Public Policy

Amicus further suggests that this Court consider seizing the opportunity presented by this case to reformulate the *Weber* rule as a matter of sound public and judicial policy.

The plan presented in this case is so devoid of potential justification that this Court should examine the signals which *Weber* sent to the courts below. Neither

13. It might be asked whether the Washington Redskins or Dallas Cowboys are guilty of discrimination because they do not employ any women on their teams. Should the National Football League be required to hire women to accord with the percentage of women in the work force, and if the League did not, would it be guilty of discrimination? Of course not.

court in the instant case focused on the principle that affirmative action can only be justified to remedy past discrimination whether that of the specific employer or, *arguendo,* some broader employer discrimination. At a minimum a clearer definition of the bounds of an acceptable plan should be announced so that other careers which may include, as petitioner's did here, voluntary demotions for the sake of experience, are not destroyed or substantially disrupted in the process of accomplishing a "good result." [*cf. Weber,* 443 U.S., at 219 (Burger, C.J., dissenting)].

Amicus suggests more. Affirmative action which results in the provision of equal opportunity does not necessarily have to involve reverse discrimination.

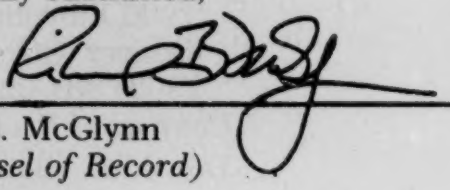
Amicus believes that it perceives a middle ground that may be exemplified by a different solution which might have been applied by the employer in *Weber. Amicus* would not argue with an employer plan under the *Weber* facts which simply would have removed the experience requirement for admission to craft jobs, coupled with the establishment of a non-race based training program from which the most qualified candidates, black or white, would be selected. The plan might well be coupled with announcements to the surrounding public at large of the availability of the program. In such a situation admission to the program on a statistical basis would injure no one, provided selection or admission to the craft job was based on merit.

Amicus would urge that a formulation such as that it has suggested above, or a like formulation propounded by the nine wiser heads on this Court, would be a proper accommodation between historical underrepresentation in a case which contained evidence of past discrimination, and Title VII's clear prohibition against discrimination as between whites and non-whites or men and women or as between members of any other protected class.

CONCLUSION

For the foregoing reasons *amicus* urges this Court to reverse the decision of the Court of Appeals for the Ninth Circuit, with instructions to enter a judgment awarding petitioner the relief payed for by him.

Respectfully submitted,



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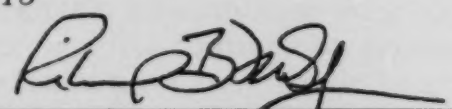

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Nos. 85-999 and 85-1129

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA,
Petitioner,
v.
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Respondents.

PAUL E. JOHNSON,
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v.
TRANSPORTATION AGENCY, SANTA CLARA COUNTY, CALIFORNIA, *et al.*,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Ninth and Eleventh Circuits

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BRIEF OF CITY OF DETROIT, THE DISTRICT OF COLUMBIA AND THE CITY OF LOS ANGELES AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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BRIEF OF CITY OF DETROIT, THE DISTRICT OF COLUMBIA AND THE CITY OF LOS ANGELES AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

CONSENT OF THE PARTIES

Consent to the filing of this Brief is excused by Rule 36.4 of the Rules of this Court.

INTEREST OF AMICI

The City of Detroit has suffered adverse consequences because of prior discriminatory practices of its public safety agencies, particularly its Department of Police,

and a failure to correct the effects of this discrimination. For the past twelve years Detroit has implemented affirmative action plans which have gone far to eradicate the effects of past discrimination against minorities and to cure the crippling effects of that discrimination upon its public safety agencies.[1]

Detroit's affirmative action efforts have been focused on promotions. The district court in *Baker v. City of Detroit*, 483 F.Supp. 930 (E.D. Mich. 1979), found, after a lengthy trial, that Detroit's steps to increase black representation at all levels of the Police Department had played a vital role in reducing citizen distrust of the police, developing community cooperation with the Department, improving the Department's ability to function, and reducing crime. *Baker, supra*, 483 F.Supp. at 997-1000. Detroit has pursued these programs unilaterally and voluntarily. However, for Detroit and many other public employers, the authority of the judiciary to decree race-conscious measures in the event unlawful discrimination were established through litigation has provided a vital catalyst for voluntary remedial action.

The District of Columbia has similarly suffered the consequences of prior discriminatory practices by its public safety agencies. Presently pending is a challenge to voluntary race-conscious measures governing hiring in its Fire Department which were sustained by the district

---

[1] Detroit's race-conscious program governing promotions in its Police Department has thus far withstood two separate challenges brought on behalf of white police officers under the Equal Protection clause and federal civil rights laws. *Detroit Police Officers Association v. Young*, 608 F.2d 671 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981), *on remand*, 36 FEP Cases 1019 (E.D. Mich. 1984), *appeal pending* (6th Cir. No. 85-1120) (sustaining race-conscious promotions to the rank of sergeant); *Baker v. City of Detroit*, 483 F.Supp. 930 (E.D. Mich. 1979), *aff'd sub nom. Bratton v. City of Detroit*, 704 F.2d 878 (6th Cir. 1983), *modified*, 712 F.2d 222 (6th Cir. 1983), *cert. denied*, —— U.S. ——, 104 S.Ct. 703 (1984) (sustaining race-conscious promotions to the rank of lieutenant).

court as appropriately "designed to break down an old pattern of racial segregation and hierarchy." *Hammon v. Barry*, 606 F.Supp. 1082, 1090 (D.D.C. 1985), *appeals pending*, Nos. 85-5669/5670/5671 (D.C. Cir.). Also pending is a challenge to race-conscious promotions undertaken by the District to undo the consequences of past racial segregation and exclusion of blacks at the highest levels of the Department. *Dougherty v. Barry*, 607 F. Supp. 1271 (D.D.C. 1985), *appeals pending* (D.C. Cir. Nos. 85-5715/5716).

The City of Los Angeles has addressed from a different perspective the historical underrepresentation of racial minorities and women in its public safety agencies. Without admitting any liability, the City of Los Angeles joined the United States Justice Department and a certified class of women police applicants in recommending entry of three consent decrees establishing goals and timetables for the hiring of racial minorities in the Los Angeles City Fire Department (1974) and for the hiring of racial minorities and women in the Los Angeles Police Department (1980).

Faced with strong statistical showings of underrepresentation in both departments, and a Court of Appeals ruling that police height and physical ability requirements produced disparate impact against women applicants without business necessity, *Blake v. City of Los Angeles*, 595 F.2d 1367, 1375-76 (9th Cir. 1979), *cert. denied*, 446 U.S. 928 (1980), the City elected to resolve this complex litigation. Also without admitting past discrimination, Los Angeles has unilaterally employed sex-conscious hiring measures to correct historical underrepresentation of women in the Fire Department and has otherwise pursued affirmative action in various municipal employment contexts.

The Los Angeles consent decrees were based largely upon the affirmative action goals and timetables contained within them. If the use of these goals and timetables cannot lawfully occur, costly litigation will re-

open, a decade of growth in racial understanding in the two departments will be threatened, and the establishment of sworn services representative of the communities they serve will be delayed.

SUMMARY OF ARGUMENT

Numerous studies by prestigious, national commissions have recognized the crippling effects of unlawful discrimination upon state and local governments, particularly on the operations of police and other public safety agencies. In extending Title VII in 1972 to cover state and local governments, Congress took note of the findings of such studies. A major legislative objective was to free governmental functions of the crippling effects of discrimination in such vital areas as public safety, education, and the administration of justice.

Last Term, the United States pressed a *per se* challenge to race-conscious affirmative action in any aspect of employment whether public or private and whether imposed by a Court or voluntarily initiated. The United States' *per se* challenge was decisively rejected. The United States now presses another, albeit narrower, *per se* challenge to affirmative action. It contends that, *regardless* of the inefficacy of other measures, affirmative, race-conscious measures are impermissible *whenever such measures occur in the context of promotions.* It is often the case that the crippling effects of past discrimination are most severely felt in the supervisory ranks of municipal employers. Further, it is often the case that use of race-conscious measures is most necessary, and urgently so, in the context of promotions to such positions. Acceptance of the United States' position would strip the federal courts and also public employers of an essential tool for overcoming patterns of racial exclusion.

Neither Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, nor the Fourteenth Amendment of the United States Constitution requires such a result.

ARGUMENT

I. EXPERIENCE SHOWS THAT MINORITY PARTICIPATION AT ALL LEVELS, ESPECIALLY SUPERVISORY LEVELS, IS VITAL TO EFFECTIVE PERFORMANCE BY PUBLIC SAFETY AGENCIES.

A. Crippling Effects of the Exclusion of Blacks From Positions of Responsible Supervision.

A *per se* rule that Title VII prohibits race-conscious remedial measures in the context of promotions would stifle efforts to end the mistrust and antagonisms that have developed in our cities between law enforcement agencies and minority citizens. Mutual alienation, with crippling effects on law enforcement and other vital public functions, has resulted in substantial part from long-standing policies and practices of exclusion of minorities from employment in law enforcement agencies. Such crippling effects are often most severely felt in the supervisory ranks of public safety agencies where, absent race-conscious measures, a paucity of minority representation may persist for many years after discrimination has ceased. An end to hiring discrimination and the undertaking even of vigorous minority *hiring* efforts will not by themselves begin to fulfill the urgent need for more minorities in higher ranks. The experience of the City of Detroit is particularly instructive in this regard.

Detroit has suffered, and federal court records document, *see Baker, supra*, 483 F.Supp. at 996-97, racially-based police-community tensions caused in substantial part by years of neglect in the recruitment, hiring and advancement of black public safety officers. Major riots in 1943 and 1967, as well as several other less noted civil disturbances before and after 1967, were just some of the many manifestations of the breakdown of police community relations. Prior to 1974, six to eight Detroit police officers were killed in the line of duty each year. Moreover, the widespread belief in Detroit's black com-

munity that the police lacked interest in investigating black-on-black crime—to a large extent, a function of the absence of blacks at supervisory and policy levels of the Department—resulted in a loss of essential citizen cooperation in the police department's crime fighting efforts. *Id.* As described by the District Court in *Baker*:

> [T]he Police Department was regarded as an 'occupation army' in the black community and was treated as such . . . . Officers were afraid to venture into the [black] community for fear of being harassed or worse.
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> * * * *
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> The primary cause was discriminatory practices. Racial criteria entered into the everyday judgments of police officers regarding who they stopped, searched or detained and how they did it. Racial slurs were common. Police brutality against black citizens was less common but still severe.
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> * * * *
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> Chief Hart testified that '[i]t's a matter of public record that members of the black community have been beaten up by police unjustifiably and without cause; it's a matter of record.'
>
> * * * *
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> The black community's response to Department practices was deep hatred and alienation. Not only did the community hate the police, it had no confidence in the police's interest in investigating or solving black on black crime. This lack of confidence was justifiable. The result was that the police got no cooperation from the black community in solving crime.
>
> This is significant because citizen cooperation is essential to solve crime. Lack of support in the black community was devastating to the Department's efforts to police the City. This was the view of Police Chief Hart, and former Chiefs Tannian and Murphy. So substantial was the community's aliena-

> tion that at times there was active interference with officers performing their duty.
>
> * * * *
>
> The police themselves—and ultimately the citizens of Detroit—were the real victims of discriminatory practices.

Id.

The persistence of police practices which poisoned relationships with the black community was attributable *less* to the underepresentation of blacks at the officer rank, substantial though it was, than to *the virtual absence of blacks in positions with the authority to curb such practices.* Until substantial numbers of black personnel appeared in supervisory and command positions, black residents of Detroit remained unpersuaded that the Department had stopped regarding them as "second class citizens" and black officers continued to feel they were regarded as "second class employees".

The willingness of Detroit to recognize and act on the destructive consequences of failure to correct the extreme underutilization of black officers, particularly at higher levels of the Department, came painfully. The riots in 1967 jolted the City of Detroit into a realization that something would have to be done to correct these imbalances. *See id.* at 946. Between 1967 and 1973 some efforts were not successful. *Id.* at 947-52. In the interim the City's public safety agencies continued to be hampered by effects of their discriminatory legacy. *Id.* at 996-99.

B. Detroit's Race-Conscious Efforts Beginning in 1974.

Finally, in 1974, the City adopted a program of affirmative action employment measures. *Id.* at 963-64. The Department's need for more blacks at the entry-level rank of Officer was satisfied, without a race-conscious goal and implementing ratio, by: (1) eliminating practices with an adverse impact on black applicants for hire;

(2) introducing a rule requiring residency in Detroit as a condition for making application; and (3) minority-focused recruiting.[2] For promotions, different steps were needed. Candidates for promotion to sergeant and lieutenant came from the existing ranks of officers and sergeants which would for many years—regardless of the efficacy of minority hiring efforts—continue to reflect the effects of longstanding and persistent discrimination in hiring to, and promotion from, the entry rank of officer. Meanwhile, the Department faced an urgent need for more black personnel as sergeants and lieutenants. A program of race-conscious promotions was adopted by the City's Board of Police Commissioners consistent with the Detroit City Charter and after public hearings at which the Chief of Police and other concerned persons presented views both for and against such a program. *Baker*, *supra*, at 964.

Under the program adopted, the Department departs from making promotions in strict rank order from the eligibility lists, and promotes instead at an approximate

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[2] As of June 1974 when Detroit commenced those efforts, the Department was 17.2% black overall but only 5.15% of the sergeants and 4.78% of the lieutenants were black. *Id.* at 963. At that time, the population of Detroit was approximately 50% black. As a result of minority hiring efforts, the Department at the end of 1978 had attained black representation overall of 34.6% and at the officer rank, 39.1%.

In 1979 and 1980, a fiscal crisis necessitated layoffs of 1,100 officers. Through application of inverse seniority, the layoffs reduced black representation to 26% overall and 28% at the officer rank. *NAACP v. Detroit Police Officers Ass'n*, 591 F.Supp. 1194, 1197 (E.D. Mich. 1984), *appeals pending*, Nos. 84-1836, 85-1026, 85-1027, and 85-1041 (6th Cir.). The bulk of those officers remained on layoff until called back in 1984 and 1985 as a result of the District Court's July 25, 1984 Order, 591 F.Supp. at 1220-1221 as revised November 7, 1984, 36 FEP Cases 434, 439 (E.D. Mich. 1984). The recall of the laid off officers and extensive additional hiring made possible by improved economic conditions have brought black representation at the officer rank to the present level of 48%.

50-50 black-white ratio. Operation of the Detroit plan is not rigid but rather depends upon the availability of qualified black applicants and consistent review by the Chief of Police and the Board of Police Commissioners. In order to be eligible for promotion, black officers have had to demonstrate their qualifications by passing the regular promotional examination. After a thorough review of the evidence, the District Court in *Baker* found that black officers promoted under the affirmative action plan were "substantially equally qualified" as the white officers who were promoted in rank order. *Baker, supra,* at 970-79. The Sixth Circuit recognized that "*only well-qualified* blacks were promoted." *Bratton, supra,* 704 F.2d at 892 (Emphasis in original). Furthermore, in public meetings the Board of Police Commissioners has regularly reviewed the affirmative action promotions proposed by the Chief of Police, *Baker, supra,* at 924-27. Service ratings of Detroit's police sergeants and lieutenants indicate that those promoted pursuant to the plan have performed as well as those promoted in rank order.

In 1979, at the direction of the District Court to establish a "terminating period", *Baker, supra,* at 1003, the Board of Police Commissioners determined that the program of race-conscious promotions would continue until black representation at the sergeant and lieutenant ranks reached 50%. See *Baker v. City of Detroit,* 504 F.Supp. 841, 845-846 (E.D. Mich. 1980). Detroit has continued to apply the promotional ratio since 1974 in pursuit of the 50% end goal. Black representation has reached 32% at the rank of sergeant and 34% at the rank of lieutenant.

C. The Fruits of Detroit's Efforts.

Detroit's affirmative action efforts have resulted in dramatic improvements in the ability of the Detroit Police Department to deliver effective police service. Perhaps the most stark evidence of the effectiveness of

Detroit's affirmative action plan was the reduction in the number of officers killed in the line of duty. Prior to 1974, six to eight police officers were killed each year; from 1974 until 1982, no officers lost their lives in the line of duty.[3] *See id.* at 1000. In *Baker*, the district court detailed this and other improvements and concluded:

> There is clear evidence in the record that before 1974 there existed enormous tension between the Department and the black community. There is clear evidence in the record that after the institution of the affirmative action program, police-community relations improved substantially, crime went down, complaints against the Department went down, and no police officers were killed in the line of duty. High ranking police officials attributed this change to the affirmative action program and its general aim of having the Department—at all levels—reflect the City's population.

Id.

Detroit's experience specifically indicates that visible representation of minorities at all levels of the police department, not merely at the patrol level, is of critical importance in breaking the pattern of hostility and alienation that results from prior exclusion of minorities. As stated by the district court:

> The testimony at trial demonstrates that it is important to have blacks at all levels. The importance of black lieutenants in reducing discriminatory practices cannot be overstated. It is very difficult to mistreat blacks if one knows that the commanding officer is black. Inspector Douglas emphasized that the presence of a black lieutenant at police raids ensured that blacks on the scene would not be abused.

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[3] Although Detroit has since suffered the death of smaller numbers of police officers, the police department's relationship with the black community continues to improve.

Similarly, a black lieutenant affects the perceptions of the black community. He is a commanding officer whose very presence confirms that blacks are no longer the second-class policemen which they used to be. Chief Hart put it this way:

> 'When [citizens] arrive at the precinct stations, they see some black lieutenants sitting behind the desk making decisions on their lives and they feel better about that. They will cooperate with us. They don't feel that we are an army of occupation.'

* * * *

Two other examples were mentioned at trial. Inspector Mack Douglas commented upon the leadership of black lieutenants in handling crowds and demonstrators. He testified concerning an incident where a white officer had gotten into an altercation with a black woman whom he had stopped for a traffic offense. A hostile crowd of 40-50 blacks had gathered and a cry of 'officer in trouble' was put out over the radio. Then-lieutenant Douglas, who is black, rushed to the potentially-explosive scene. He was able to calm the crowd, assure them he would personally look into the incident, and persuade them to disperse.

Chief Hart testified concerning a barricaded gunman situation. When dealing with this crisis situation, the police have to handle both the gunman and the crowds which inevitably develop. In the past, the crowds were often hostile to white officers. With a black lieutenant in control, the crowds were not a problem.

Id. at 998-99. In the experience of Detroit, the ability to make race-conscious employment decisions has been the critical ingredient in efforts to restore community trust in Detroit's law enforcement agencies and to facilitate Detroit's ability to protect the lives and property of its people. *See id.* at 999.

The importance of race-conscious promotions was highlighted especially during the period from 1980 through mid-1985 when large numbers of officers were laid off and black representation at the officer rank was sharply reduced. The District Court in *NAACP v. DPOA, supra,* described unrebutted testimony by Detroit's police officials that "community relations with the police force had dramatically improved since 1974" "as the result of the increase in black representation on the police force . . . ." 591 F.Supp. at 1206. The Court credited testimony that, notwithstanding the effect of the layoffs, there remained "a residue of good will in the community resulting from the increased black representation on the force." *Id.* While observing that this "good will" is "not inexhaustible", the District Court in *NAACP* credited its endurance over a period of several years in part to "*the presence of many black command officers, who were unaffected by the layoffs. . . .*" *Id.* (Emphasis added).

Use of race-conscious measures in promotions has been the centerpiece of Detroit's affirmative action efforts. Consistent with the concerns stated in *Weber* and in Justice Powell's opinion in *Wygant v. Jackson Board of Education,* —— U.S. ——, 106 S.Ct. 1842, 1851-1852 (1986), Detroit has refrained from use of race-conscious measures in layoffs.[4] In Detroit's experience, the increased presence of black personnel in positions of responsible supervision has proved to be of critical importance in carrying forward critical improvements in citizen cooperation during a several-year period when black representation at the officer level was severely reduced.

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[4] In the *NAACP* case, the district court determined that Detroit's failure to preserve the 1978 level of black representation through use of race-conscious measures was in violation of the Constitution. Detroits' appeal from that determination is pending in the Sixth Circuit.

D. The Experience of Other Cities.

Overwhelming evidence of the experience in many other cities demonstrates that the crisis experienced by Detroit is only one example of a nationwide problem. The Sixth Circuit has collected and summarized the many studies that make the importance of having racially representative police forces in our cities judicially noticeable. The operational need to have a minority presence in public safety agencies that is representative of the minority population of the community served

> is based on law enforcement experience and a number of studies conducted at the highest levels. *E.g.*, National Advisory Commission on Criminal Justice Standards and Goals, *Police* (1973); National Commission on the Causes and Prevention of Violence, *Final Report: To Establish Justice, To Insure Domestic Tranquility* (1969); Report of the National Advisory Commission on Civil Disorders (1968); President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Police* (1967). As these reports emphasize, the relationship between government and citizens is seldom more visible, personal and important than in police-citizen contact. See *To Establish Justice, supra* at 145; *Report on Civil Disorders, supra* at 300 (New York Times edition). It is critical to effective law enforcement that police receive public cooperation and support. *Report on Civil Disorders, supra* at 301; *Task Force Report: The Police, supra* at 144-45, 167; *Police, supra* at 330.
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> These national commissions recommended the recruitment of additional numbers of minority police officers as a means of improving community support and law enforcement effectiveness. In fact, the benefits of Negro officers were recognized as early as 1931 by the 'Wickersham Commission.' *Report on the Causes of Crime* 242, National Commission on Law Observance and Enforcement (Vol. I, 1931).

In 1967, a presidential commission stated the proposition offered by the defendants in this case:

> In order to gain the general confidence and acceptance of a community, personnel within a police department should be representative of the community as a whole.

Task Force Report: The Police, *supra* at 167.

Detroit Police Officers Ass'n v. Young, 608 F.2d at 695.[5]

More recently completed studies have reached the same conclusion. In a report published in October 1981, the United States Commission on Civil Rights found: "Serious underutilization of minorities and women in local law enforcement agencies continues to hamper the ability of police departments to function effectively in and earn the respect of predominantly minority neighborhoods, thereby increasing the probability of tension and violence." U.S. Commission on Civil Rights, *Who Is Guarding the Guardians: A Report on Police Practices*, 5 (1981). Following an investigation into the May 1980 racial disturbance in Miami, Florida, the U.S. Civil Rights Commission observed: "In Dade County, an essentially white system administers justice to a defendant and victim population that is largely black. The lack of minorities throughout the criminal justice system maintains the perception of a dual system of justice." U.S. Commission on Civil Rights, *Confronting Racial Isolation In Miami*, 290 (1982).

These studies confirm Detroit's experience that minority representation at the higher levels of law enforcement also is crucial. A 1967 Report of the President's

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[5] Other courts of appeals have agreed with the Sixth Circuit concerning the operational need for a racially representative police force. *See Talbert v. City of Richmond*, 648 F.2d 925, 931 (4th Cir. 1981), *cert. denied*, 454 U.S. 1145 (1982); *Bridgeport Guardians, Inc. v. Members of the Bridgeport Civil Service Comm'n*, 482 F.2d 1333, 1341 (2d Cir. 1973), *cert. denied*, 421 U.S. 991 (1975).

Commission on Law Enforcement and Administration of Justice, entitled *Task Force Report: The Police*, concluded that: "[i]f minority groups are to feel that they are not policed entirely by a white police force, they must see that Negro or other minority officers participate in policymaking and other crucial decisions." *Id.* at 172. Relying on this and other studies, the Sixth Circuit concluded that the need for a police department representative of the community as a whole "extends to the higher ranks in police departments." *Detroit Police Officers Ass'n v. Young*, 608 F.2d at 695.

The federal government also has recognized the public safety crisis created by discrimination against minorities by state and local law enforcement agencies and has called for affirmative action to remedy this problem. The Law Enforcement Assistance Administration (LEAA)[6] has concluded "that the full and equal participation of women and minority individuals in employment opportunities in the criminal justice system is a necessary component to the Safe Streets Act's program to reduce crime and delinquency in the United States." 28 C.F.R. § 42.301 (1985). LEAA regulations require that where a "recipient has previously discriminated against persons on the ground of race . . . [or] color . . ., the recipient must take affirmative action to overcome the effects of prior discrimination." 28 C.F.R. § 42.203(i)(1) (1985).[7]

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[6] The LEAA is the arm of the Department of Justice which administers federal financial assistance to state and local law enforcement agencies and which enforces the anti-discrimination provisions of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, Pub. L. No. 90-351, 82 Stat. 197; Pub. L. No. 91-644, 84 Stat. 1881; 42 U.S.C. § 3789d.

[7] The regulations also provide that, "[e]ven in the absence of such prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race . . . [or] color . . . ." 28 C.F.R. § 42.203(i)(2) (1985). Although there are statutory provisions stating that the LEAA may

This Court in *United Steelworkers v. Weber*, 443 U.S. 193 (1979), upheld the voluntary use of affirmative, race-conscious measures under Title VII as an appropriate means of removing racial barriers and opening employment opportunity. Acceptance of Petitioners' *per se* challenge to the decreeing of such measures would not only strip the courts of an essential remedial tool but would eliminate a vital catalyst to the voluntary affirmative action held salutary in *Weber*. Such a result would go far to defeat the purpose of Congress in 1972 of extending Title VII to state and local governments.

II. THE DESIRE TO CORRECT THE CRIPPLING EFFECTS OF DISCRIMINATION ON PERFORMANCE OF PUBLIC SAFETY FUNCTIONS WAS A LEADING CONCERN OF CONGRESS IN EXTENDING TITLE VII COVERAGE TO STATE AND LOCAL GOVERNMENTS.

In extending Title VII to cover state and local governments, Congress recognized that governmental ability to carry out vital functions in the areas of public safety, education and administration of justice was crippled in many instances by a legacy of discrimination. Congress contemplated that remedies would be devised which would effectively overcome patterns of racial exclusion and thereby remove impediments to government's ability to function. Affirmative remedies "mirror" Congress' objective. *United Steelworkers v. Weber*, 443 U.S. 193, 208 (1979).

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not require a recipient to adopt "a percentage ratio, quota system, or other program to achieve racial balance," 42 U.S.C. § 3789d(b), the regulations promulgated thereunder recognize that "[t]he use of goals and timetables is not use of a quota prohibited by this section." 28 C.F.R. § 42.203(j) (1985). Notably, the statute in its original form prohibited remedies intended "to achieve racial balance or *to eliminate racial imbalance*." 42 U.S.C. § 3766 (1976) (emphasis added). This last restriction was deleted by Section 815(b)(1) of the Justice System Improvement Act of 1979, Pub. L. No. 96-147, 93 Stat. 1167, 1206 (1979).

Subsequent to the enactment of Title VII in 1964, widespread community unrest including riots in numerous cities and other localities provoked a heightened concern regarding the quality of race relations in this country. As set forth above, a succession of national commissions drew attention to the low representation of minority groups in policing and other public safety functions as a cause of the disorders.

Congress in 1972 subscribed explicitly to the concerns expressed in these reports. In extending Title VII coverage to state and local governments, Congress looked for guidance specifically to two such reports by the U.S. Commission on Civil Rights: (1) *For All the People . . . By All the People—A Report on Equal Opportunity in State and Local Government Employment* (1969), and (2) *Mexican Americans and the Administration of Justice in the Southwest* (1970). These two Commission reports were quoted in both the Senate and House Committee reports; referred to in debate by the sponsor of the legislation; and set forth in full in the Congressional Record.

Congress took notice of the crippling effects of racial exclusions from public employment on the ability to govern. It identified the need to remedy this condition as one of the central purposes of extending Title VII to cover state and local governments. The Report of the Senate Committee on Labor and Public Welfare, citing the reports of the U.S. Commission on Civil Rights, stated:

> This failure of State and local governmental agencies to accord equal employment opportunities is particularly distressing in light of the importance these agencies play in the daily lives of the average citizen. From local law enforcement to social services, each citizen in a community is in constant contact with many local agencies. . . . Discrimination by government therefore serves a doubly destructive

> purpose. *The exclusion of minorities from effective participation in the bureaucracy not only promotes ignorance of minority problems in that particular community, but also creates mistrust, alienation, and all too often hostility towards the entire process of government.*" S.Rep. No. 92-415, 92d Cong., 1st Sess. 10 (1971), *reprinted in 1972 Leg. Hist.* at 419 (emphasis added).[8]

The Report of the House of Representatives Committee, also citing the Civil Rights Commission reports, was to the same effect:

> The problem of employment discrimination is particularly acute *and has the most deleterious effect in these governmental activities which are most visible to the minority communities* (notably education, law enforcement, and the administration of justice) *with the result that the credibility of the government's claim to represent all the people is negated.* H.R. Rep. No. 92-238, 92d Cong., 1st Sess 17 (1971), *1972 Leg. Hist.* at 77 (emphasis added).

Senator Harrison Williams, chairman of the Labor and Public Welfare Committee and sponsor of S.2515, emphasized strongly the Congressional concern for the ability of units of state and local government to carry out their assigned responsibilities. He stated that the Committee had acted out of a belief that their work was "essential to the viability of State and local governmental units." *1972 Leg. Hist.* at 1116. He stated that the Senate Committee's concern with employment discrimination was based, in large part, upon the unfavorable impact which it had on "the ability of . . . governmental units to deal equitably in their contacts with those groups against whom they discriminate in employment." *Id.* As Senator Williams succinctly phrased the matter,

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[8] References to *1972 Leg. Hist.* are to *Subcommittee on Labor of the Senate Committee on Labor and Public Welfare*, 92d Cong., 2d Sess., *Legislative History of the Equal Employment Opportunity Act of 1972*, (Comm. Print 1972).

"If they are to carry out their jobs with any success whatever, public confidence in their impartiality is vital." *Id.* (emphasis added).

In the course of Senate debate, Senator Williams referred to and placed in the Congressional Record, both Reports of the U.S. Commission on Civil Rights. *1972 Leg. Hist.* at 1117, *et seq.* With respect to race-conscious remedies, the 1969 Report stated:

> [W]henever in public employment discriminatorily created patterns persist, the Constitution requires that they be remedied *by measures aimed at giving the work force the shape it presently would have were it not for such past discrimination.* It should be recognized that such measures are not a 'preference' but rather a restoration of equality; one can see inequity in such remedies only by being blind to the past injustices which they cure.

1972 Leg. Hist. at 1120 (emphasis added). The Commission's 1969 Report called for state and local governments to adopt programs which will "bring about whatever changes in minority utilization are necessary to undo the effects of past discrimination." *1972 Leg. Hist.* at 1120. *"Where patterns of minority utilization are to be changed, the program should include specific goals, or estimates, to be achieved within a specified period of time."* *Id.* (emphasis added).

Congressional solicitude for assuring the ability of local governmental units to carry out their essential functions is in harmony with court decisions such as *Baker* upholding Detroit's use of race-conscious measures in its police department. It matches precisely the experience of *amici* in pursuing race-conscious affirmative measures to increase minority representation in their public safety departments. To date, those measures have gone far toward undoing the debilitating effects of discrimination which influenced Congress to extend Title VII to cover state and local governments.

III. THERE IS NO BARRIER UNDER TITLE VII OR THE CONSTITUTION AGAINST USE OF RACE-CONSCIOUS MEASURES IN CONNECTION WITH PROMOTIONS.

This Court's prior decisions involving affirmative action have produced a considerable degree of consensus. All of the Justices have determined that if there is a *sound basis for concluding* that a public employer has engaged in prior discrimination then the public employer may take race-conscious remedial affirmative action. The United States last Term contended that a governmental employer may not, in any circumstance, implement a race-conscious affirmative action plan which provides a benefit to an individual without first proving that the individual was a victim of racial discrimination. The Supreme Court unequivocally rejected that position. Justice Powell, joined by Chief Justice Burger and Justice Rehnquist, concluded in *Wygant v. Jackson Board of Education, supra*, 106 S.Ct. at 1850, "that in order to remedy the effects of prior discrimination, it may be necessary to take race into account. As part of this Nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy." Justice O'Connor summarized:

> The Court is in agreement that, whatever the formulation employed, remedying past or present racial discrimination by a state actor is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program. This remedial purpose need not be accompanied by contemporaneous findings of actual discrimination to be accepted as legitimate as long as the public actor has a firm basis for believing that remedial action is required.

Wygant, supra, 106 S.Ct. at 1853 (O'Connor, J.)

In the course of his *Wygant* plurality opinion, Justice Powell spoke in broad terms regarding use of race-

conscious measures, respectively, in hiring and in layoff. Justice Powell observed that "[i]n cases involving valid *hiring* goals" the burden on innocent individuals is largely "diffused among society generally" and that denial of hire is less "intrusive" than "loss of an existing job." 106 S.Ct. at 1851. Justice Powell proceeded to focus on the unique burden on innocent individuals arising from race-conscious layoffs:

> Even a temporary layoff may have adverse financial as well as psychological effects. A worker may invest many productive years in one job and one city with the expectation of earning the stability and security of seniority. . . . Layoffs disrupt these settled expectations in a way that general hiring goals do not.
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> While hiring goals impose a diffuse burden, often foreclosing only one of several opportunities, layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives. That burden is too intrusive. *Id.* at 1851-1852.

Based on this discussion, the Petitioners present a simplistic contention for a *per se* rule against race-conscious measures for promotions: as in the case of layoffs, the burden of a race-conscious promotion is said to be borne by the particular individuals who are passed over for promotion rather than diffused among society generally. Brief of United States in *Paradise*, ——; Brief of Petitioners in *Johnson*, 32-42. This argument—lumping promotions together with layoffs in supposed joint contrast to hiring—is contrary to *Weber*. *Weber* itself involved, not a hiring program whose burden was diffused among society generally, but an in-plant training program. Selection to that program, which carried with it advancement to craft status, was a matter of *promotion*, not *initial hire*. The non-selection of Mr. Weber for that program defeated his own individual seniority expectation every bit as much as a race-conscious layoff would

defeat the individual seniority expectation of employees laid off thereby. Nevertheless, the Supreme Court contrasted the *race-conscious promotion* involved in *Weber* with a measure causing *loss of employment* by an innocent individual. It was on this basis that the Court in *Weber* held that the plan at issue there *did not trammel* the interests of nonminorities and accordingly *was not too intrusive.* Criitcal to the Court in *Weber* was the fact that the plan did not create an "absolute bar" to advancement of white employees inasmuch as half of those trained in the program would be white. Thus, in *Weber* itself, the Court's concern with excessive burden upon nonminority employees was focused upon (1) removal of white workers from the work force, and (2) absolute bars to advancement.

It is plain that race-conscious measures in promotions *do not* impose the same sorts of burdens as layoffs. They do not remove any individual from the work force. Nor would any properly-drawn promotional measure constitute an "absolute bar"—or even an undue bar—on the advancement of nonminorities.[9]

Promotions also present a far different case than layoffs from the standpoint of the existence of less intrusive means. Justice Powell observed

> Other, less intrusive means of accomplishing similar purposes—such as the adoption of hiring goals—are available. For these reasons, the Board's selection of layoffs as the means to accomplish even a valid purpose cannot satisfy the demands of the Equal Protection Clause.

Wygant, supra, 106 S.Ct. at 1852. In *Wygant,* the "valid purpose" was increasing the representation of minorities

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[9] Since the inception of race-conscious promotional measures in Detroit, several hundred white officers have been promoted to the ranks of sergeant and lieutenant. Detroit's program is hardly a bar on advancement by nonminorities.

as teachers in a particular school system; in Justice Powell's view, that purpose could be satisfactorily advanced through race-conscious hiring without provision for preferential layoffs. *Cf.* Opinion of Marshall, J. dissenting, 106 S.Ct. at 1865-1866. The notion of race-conscious hiring as a "less intrusive means" would obviously have had no application in a setting such as *Weber* or in other cases where increasing minority representation in positions beyond the entry level is itself the "valid purpose". In *Weber*, the Court recognized the exclusion of minorities from craft employment. *Weber, supra*, 443 U.S. at 198, n.1. Given the unavailability of minority skilled craftsmen in the exterior labor market, merely setting a goal for *hiring* minority craftsmen would obviously have been ineffectual as a means for increasing minority representation in Kaiser's craft workforce.

Use of a race-conscious promotional measure by Kaiser and the United Steelworkers *was the least intrusive means* just as it was in Detroit. A hiring goal would have failed, for many years to come, to satisfy Detroit's urgent need for more blacks in positions of responsible supervision. As stated by the Sixth Circuit

> [T]he use of racial classifications reflects the only legitimate method for achieving [the] objectives [of the plan] in light of the urgent need for a remedy and the practical limitations placed on the effective use of other means . . . .

Bratton v. City of Detroit, 704 F.2d at 892. See also *Baker, supra*, 483 F. Supp. at 994 ("the affirmative action program was necessary to ensure the rapid eradication of past discriminatory effects . . . *nothing less than race-conscious promotions could do this.*") (emphasis added).

CONCLUSION

This Court should decisively reject the contention that race-conscious measures are prohibited when they involve promotions either by the Constitution or by Title VII.

Respectfully submitted,

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No. 85-1129

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

PAUL E. JOHNSON,

Petitioner,

v.

TRANSPORTATION AGENCY,
SANTA CLARA COUNTY, CALIFORNIA,
and
SERVICE EMPLOYEES INTERNATIONAL
UNION LOCAL 715,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF COUNTIES, U.S. CONFERENCE OF MAYORS, AND INTERNATIONAL CITY MANAGEMENT ASSOCIATION, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether a local government may, consistent with Section 703(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a), voluntarily adopt and apply a limited affirmative action plan under which the gender of applicants may be considered in making hiring and promotion decisions in order to remedy past discrimination evidenced by a gross statistical disparity in the representation of males and females in skilled craft positions.

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INTEREST OF THE *AMICI CURIAE*

The *amici*, organizations whose members include municipal and county governments and their officials located throughout the United States, have a vital interest in legal issues that affect local governments. In this case, petitioner, a white male employee of a local government agency who failed to obtain a promotion, brought suit, alleging that the agency had discriminated against him in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, by applying a limited, voluntarily adopted affirmative action plan in making the promotion decision.

The decision in this case will have a significant effect on local governments. Hundreds of local governments have voluntarily adjusted their employment practices in an effort to rectify past discrimination and thereby to assure compliance with Title VII. The type of [illegible]ary affirmative action plan at issue in this case, [illegible]ich race or gender may be used as a "plus factor" in making hiring and promotion decisions, is common. If the position of petitioner and his supporting *amici* were to prevail, local governments with gross statistical disparities in the composition of their work forces would effectively be barred from undertaking this limited form of voluntary affirmative action.

Affirmative action plans like the one at issue here are implemented without using quotas or violating the merit selection procedures of applicable civil service laws. Local governments have found that such plans provide the most practical and flexible way for them to eradicate the effects of past discrimination without infringing on any significant interests of nonminority employees. These plans are generally developed on the basis of community-wide participation, including various public proceedings, involvement of employee groups, and negotiations with the collective bargaining representatives of all employees who could be affected by the plan, including nonminority employees. They therefore are likely to be more workable and fair than a plan imposed by court order or through a consent decree.

In advocating a requirement that the employer not only introduce highly probative statistical evidence, but also prove its own prior discrimination, petitioner and the federal government would impose an impossible burden on local governments that are attempting, in good faith, to implement a voluntary remedy. Such a burden would deter voluntary efforts to comply with Title VII and would make case-by-case litigation the only realistic means of assuring compliance with the nation's most basic civil rights law. Such a requirement would create years of litigation, would place an intolerable burden

on local governments, and ultimately would frustrate the objectives of Title VII.*

STATEMENT

1. In 1978, respondent Transportation Agency of Santa Clara County voluntarily adopted an affirmative action plan intended in part "to provide women the maximum possible opportunity to obtain equitable employment and career progression in the Agency's professional, technical and skilled job classifications where women have not been traditionally employed and where they are presently underrepresented" (J.A. 34). Respondent stated in the plan that affirmative action was necessary "to remedy the effects of past practices" and that the plan would benefit its employees "who may have been subjected to discriminatory personnel practices in the past" (J.A. 31, 35).[1] The plan incorporated nondiscrimination requirements imposed by the Urban Mass Transportation Administration and other governmental agencies (J.A. 39, 40).[2] Respondent's long-term goal was, and is, to attain a work force employing minorities, women and handicapped persons "in numbers consistent with the ratio of these groups in the area work force" (J.A. 31).

Respondent emphasized in the plan that none of its 238 skilled craft positions was filled by a woman at the time that the plan was adopted. Similarly, only one out of respondent's 110 road maintenance workers was a

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* Pursuant to Rule 36 of the Rules of this Court, the parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court.

[1] The evidence at trial included examples of alleged discrimination by respondent. See J.A. 20-21; Tr. 252-253. Respondent's director stated that "a number of charges" of discrimination against women had been brought against the Agency since 1978 (Tr. 43).

[2] Numerous federal statutes and executive orders impose equal employment opportunity responsibilities on state and local governments. See, *e.g.*, 15 U.S.C. 636(j)(9); 31 U.S.C. 6716; Exec. Order 11246, 30 Fed. Reg. 12319 (1965); Exec. Order 11375, 32 Fed. Reg. 14303 (1967).

woman. The area work force, by contrast, was composed at the time of over 36% women. J.A. 54. While its earlier affirmative action efforts had resulted in substantial increases in the employment of racial and ethnic minorities, especially in newly created positions, respondent recognized that "[w]omen are the most underrepresented group in the Agency" (J.A. 53). Respondent concluded that "it will be a slow and extremely difficult task to attain the Agency's Affirmative Action employment goals," especially with respect to women in areas, such as skilled crafts, "where they have traditionally been greatly underrepresented" (J.A. 58, 60).

The plan provided that respondent would attempt to meet its long-term employment goal by giving "special consideration" to female applicants for new or vacated positions in areas where women were underrepresented, as well as through recruitment, training, validation of selection criteria, and similar activities (J.A. 60, 65-84). Respondent's plan did not require the employment of a fixed quota of women or minorities.[3]

Respondent's affirmative action plan in effect at the time of trial in 1982 showed that only six out of 349 skilled craft workers then employed by the Agency were women. The long-term goal remained 36%, or 127 women. C.A. Record Excerpts 84. Of the 55 new skilled craft positions expected to become available that year,

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[3] Indeed, the county-wide affirmative action plan adopted in 1979 clearly distinguished between "goals," which were defined as "good faith quantitative objectives," and "quotas," which were defined as "fixed hiring and promotion rates" (J.A. 129-130). See also J.A. 123 ("The 'goals' * * * should not be construed as 'quotas' that must be met. The 'goals' should rather be seen as realistic desired levels of achievement * * * tak[ing] into account" turnover, vacancies, the availability of qualified female applicants, and similar factors.). The county refused to adopt voluntarily any quotas in its affirmative action plan: "Quotas are considered to be last resort measures available only for the courts to impose when good faith efforts do not exist" (J.A. 130).

respondent established a goal of filling three with women (J.A. 143).[4]

2. a. Petitioner Paul E. Johnson and Diane Joyce were employed by respondent during the time period covered by this action as road maintenance workers in the Road Operations Division of the Transportation Agency. Both had some experience as road dispatchers, a skilled craft position. Dispatchers are responsible for allocating crews and equipment to road maintenance tasks. Pet. App. 18a-19a.

Twelve persons, including petitioner and Joyce, applied for a vacant road dispatcher position in 1979. Nine of the candidates were given an oral examination by the County Personnel Department. No written test was administered. On the basis of the oral examination, seven persons were found to be qualified, with scores of 70 or above. Petitioner was tied for second with a score of 75. Joyce was next with a score of 73. A second round of oral interviews was then conducted by a three-member panel from the Road Operations Division. This panel recommended the promotion of petitioner. The director of the Agency, however, was not required by county civil service procedures to adopt the panel's recommendation. Pet. App. 4a, 11a, 18a-20a.

In the meantime, Joyce had contacted respondent's affirmative action coordinator because she was concerned about being treated unfairly, particularly by one of the Road Operations Division interviewers (Pet. App. 11a-12a, 19a; Tr. 95). The coordinator discussed the case with the Agency's director. The director subsequently concluded that petitioner and Joyce "were both capable of performing the work" (Tr. 25). He took Joyce's gender

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[4] At the time of trial, a federal class action was pending charging respondent with discrimination against women. In 1985, that case was settled by a consent decree under which respondent agreed to a goal of filling 30% of available service and driver positions with women and to pay damages to fourteen class members. We understand that respondent has lodged a copy of the consent decree with the Clerk.

"into account" as a "positive factor" in deciding to select her for the road dispatcher position (Tr. 25).

b. Petitioner commenced this action in the United States District Court for the Northern District of California, alleging that respondent's decision to promote Joyce rather than him violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*[5] Following a bench trial, the district court entered judgment in petitioner's favor, ordering his promotion to road dispatcher and awarding back pay of $5,650 (Pet. App. 1a-2a, 3a-16a). The court found that petitioner would have been promoted but for his gender (*id.* at 13a). The district court took the view that respondent bore the burden of persuading the court that its affirmative action plan was consistent with the criteria set forth in *United Steelworkers of America* v. *Weber*, 443 U.S. 193 (1979) (see Pet. App. 8a). The court concluded that the plan was not consistent with the requirements of *Weber* because respondent had failed to show that its plan was temporary in nature (*id.* at 6a-8a, 14a).[6]

c. The court of appeals reversed (Pet. App. 17a-47a, 48a-52a). The court stated that *Weber* "did not establish a rigid formula for testing the validity of an affirmative action plan," and that respondent's plan was "sufficiently temporary" to satisfy *Weber* because it was "not intended to maintain male-female balance, but simply to eliminate a manifest male-female imbalance" (*id.* at 24a, 25a). The court noted that respondent's plan "does not establish fixed percentages for hiring, training, or pro-

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[5] Petitioner did not allege that respondent's action violated the Equal Protection Clause of the Fourteenth Amendment. See Pet. App. 29a n.1.

[6] The district court also stated that it "d[id] not feel" that respondent had shown that it had previously engaged in a pattern of discrimination sufficient to justify its affirmative action plan (Pet. App. 9a). The court went on to assert, without any extended discussion, that respondent had not engaged in prior discrimination against women (*id.* at 13a). The court expressly declined, however, to rest its decision on this ground (*id.* at 9a-10a).

motion," but rather "allows flexibility in working towards the long-range goals, with special emphasis on recruitment, selection, training, and promotion of minorities, women, and the handicapped" (*id.* at 25a). In accordance with the plan, Joyce's gender was considered simply "as an additional positive factor in an otherwise qualified candidate" (*id.* at 29a).

The court of appeals rejected the view that respondent was required to prove its prior discrimination in order for its affirmative action plan to be legal under Title VII: "In order to demonstrate that its plan is remedial, an employer need not show its own history of purposeful discrimination. It is sufficient for the employer to show a conspicuous imbalance in its work force." Pet. App. 26a (footnote omitted). The complete absence of women among the 238 skilled craft positions satisfied this requirement.[7] Finally, the court concluded that Joyce's promotion "aptly served the Agency plan's remedial purpose" of addressing this imbalance (*id.* at 27a).[8]

SUMMARY OF ARGUMENT

This case concerns the evidence necessary under Title VII to justify an employer's voluntary decision to use gender as a "plus factor" in hiring and promotion decisions. It presents the Court with an opportunity to clarify the relationship between two lines of cases: one holding that evidence of a statistical disparity in the composition of an employer's work force may provide the basis for a discrimination claim under Title VII (see, *e.g.*, *International Bhd. of Teamsters* v. *United States*,

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[7] The court stated that the burden is on the plaintiff to prove that the affirmative action plan is invalid. It concluded, however, that even if the burden were on the employer, respondent had met that burden here. Pet. App. 30a n.2.

[8] Judge Wallace concurred in part and dissented in part (Pet. App. 32a-47a, 51a-52a). He concluded that the district court's findings were inadequate to make a decision on the validity of the plan, and he would therefore have remanded to the district court for further proceedings.

431 U.S. 324 (1977); *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971)); and the other holding that voluntary affirmative action is a permissible remedy for past discrimination (see, *e.g.*, *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979)).

There are no easy answers to the difficulty posed by affirmative action—the need to implement race or gender-conscious employment practices in order to eliminate the effects of prior discrimination, while attempting to avoid injury to innocent third parties. This case can be decided, however, on the basis of a logical and justifiable rule: an employer should be free to adopt modest affirmative action measures on the basis of statistical evidence that would be likely to expose it to liability to an unsuccessful minority candidate, without thereby making itself liable to a nonminority candidate in a reverse discrimination action. If such action is not permitted under Title VII and the Fourteenth Amendment, an employer would be "trapped between the competing hazards of liability to minorities if affirmative action *is not* taken to remedy apparent employment discrimination and liability to nonminorities if affirmative action *is* taken" (*Wygant* v. *Jackson Board of Education*, No. 84-1340 (May 19, 1986), slip op. 8 (O'Connor, J., concurring in part and concurring in the judgment) (emphasis in original)).

This rule is clearly reasonable, and petitioner and his *amici* wisely do not take direct issue with it. They would, however, eviscerate it in practical terms by requiring that the employer bear the burden of proving in court its own prior illegal discrimination in order to justify application of an affirmative action plan. Such a requirement finds no support in this Court's precedents and would serve no legitimate purpose. Moreover, it would eliminate, in substantial part, the ability and willingness of employers to comply with Title VII through voluntary affirmative action measures. Employers would thus be unable to ameliorate the effects of their prior discrimination and to reduce their exposure to liability

in actions brought by minorities. Nothing in Title VII or the Fourteenth Amendment requires such an untoward result.

ARGUMENT

A PUBLIC EMPLOYER MAY VOLUNTARILY ADOPT AND APPLY A LIMITED AFFIRMATIVE ACTION PLAN IN ORDER TO REMEDY PAST DISCRIMINATION EVIDENCED BY A GROSS STATISTICAL DISPARITY IN THE COMPOSITION OF ITS WORK FORCE

Acting on the "compelling basis" [9] of an extreme disparity between the percentage of males and females in its skilled-craft work force and their percentage in the local work force, respondent Transportation Agency of Santa Clara County voluntarily adopted a limited affirmative action plan. Pursuant to that plan, respondent's director considered Diane Joyce's gender as a flexible " 'plus' " that was "simply one element * * * in the selection process" [10] for filling a vacant road dispatcher position. The director chose Joyce, who had previously been found to be qualified and was indisputably "capable of performing the work" (Tr. 25), rather than petitioner, for the position.

Petitioner and his supporting *amici* seek to invalidate that decision on constitutional and statutory grounds as impermissible "reverse discrimination." [11] While they

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[9] *Wygant* v. *Jackson Board of Education*, No. 84-1340 (May 19, 1986), slip op. 9 (O'Connor, J., concurring in part and concurring in the judgment).

[10] *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 317, 318 (1978) (Powell, J., announcing the judgment of the Court).

[11] We put to one side both petitioner's belated attempt to rely on the Fourteenth Amendment and the question whether the standard of scrutiny for gender-conscious affirmative action differs from that applicable to race-conscious affirmative action, because any differences in terminology with respect to the level of scrutiny are not dispositive. In our view, voluntary gender-conscious and race-conscious affirmative action plans should be assessed under the same criteria because any distinctions between the applicable standards would present serious logical and practical obstacles. Moreover,

grudgingly acknowledge a place for affirmative action, their position, if accepted, would in large measure bring to an end voluntary affirmative action in this country. The requirement urged by petitioner and his *amici*—that an employer prove in court its own past illegal conduct in order to justify affirmative action—would "place[] voluntary compliance with Title VII in profound jeopardy" (*United Steelworkers of America* v. *Weber*, 443 U.S. 193, 210 (1979) (Blackmun, J., concurring)). Thus, employers would be left more precariously than ever on the " 'high tightrope' " (*ibid.* (citation omitted)) between liability to minorities for past discrimination and liability to nonminorities for attempting voluntarily to remedy such discrimination: should they adopt affirmative action measures, employers would face not only the expected suits by disappointed nonminorities, but also, in defending those suits, employers would provide the foundation for their own future liability to minorities.

In analyzing this case, it is important to recognize the significant areas of agreement on the principles applicable to judging affirmative action plans. Justice O'Connor observed last Term without contradiction that "the Court is at least in accord in believing that a public employer, consistent with the Constitution, may undertake an affirmative action program which is designed to further a legitimate remedial purpose and which implements that purpose by means that do not impose disproportionate harm on the interests, or unnecessarily trammel the rights, of innocent individuals directly and adversely affected by a plan's racial preference" (*Wygant*, slip op. 4 (opinion concurring in part and con-

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there is no basis for petitioner's apparent contention that the Fourteenth Amendment imposes a greater burden for justification of voluntary affirmative action than does Title VII. See *Wygant*, slip op. 3 (O'Connor, J., concurring in part and concurring in the judgment) ("The Court is in agreement that, whatever the formulation employed, remedying past or present racial discrimination by a state actor is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program.").

curring in the judgment)). We support this formulation, and neither petitioner nor his *amici* have taken a contrary position. Similarly, we agree with petitioner and his *amici* that affirmative action is most clearly justified in situations where the employer discriminated in the past.[12]

Thus, the "principal issue" is "what quantum and burden of proof will serve to make out a sufficient remedial purpose" (U.S. Br. 16). Here we part company with petitioner and his *amici*. Whatever the rule may be for more far-reaching and intrusive affirmative action, the Court's precedents make clear that respondent's promotion decision is justified by the extreme statistical disparity here. In light of the realities of defending employment discrimination suits and making employment policy under the threat of litigation, to require more would serve no legitimate purpose and would frustrate the purposes of Title VII.

Requiring proof of prior discrimination as a condition of voluntary affirmative action would severely disrupt the operations of local government. Lawsuits alleging discrimination may be especially divisive when the defendant is a public entity obligated to act for the good of the community's residents. To require such an entity to prove its own failure to comply with the Constitution and laws of the United States would open old wounds, spawn endless litigation, and cause confusion and dislocation in governmental personnel systems.

Accordingly, limited affirmative action measures that do not "unnecessarily trammel" (*Weber*, 443 U.S. at 208) the interests of nonminorities should be permitted on the

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[12] While much discussed in the briefs (see, *e.g.*, U.S. Br. 13-16), the question whether discrimination by society at large may ever justify even extremely limited affirmative action is not at issue here because respondent does not rely on societal discrimination to support its hiring decision in this case. Rather, respondent established its affirmative action plan because the gross statistical disparity in the make-up of its work force indicated the probable existence of past discrimination. See pp. 3-4, *supra*.

basis of statistical evidence "sufficient to support a prima facie Title VII pattern or practice claim by minority" applicants or employees (*Wygant*, slip op. 9 (O'Connor, J., concurring in part and concurring in the judgment)). If such evidence of statistical disparity is presented, "it is incumbent upon the nonminority [plaintiffs] to prove their case; they continue to bear the ultimate burden of persuading the court that the [employer's] evidence did not support an inference of prior discrimination and thus a remedial purpose" (*id.* at 9-10).

A. Respondent's Affirmative Action Plan Satisfies Criteria Previously Approved By This Court

The affirmative action plan at issue in this case is typical of plans adopted by state and local governments across the country.[13] Like many such plans, it establishes hiring and promotion goals intended to eliminate the effects of past discrimination while minimizing the impact of these efforts on nonminorities. This type of voluntary, limited affirmative action is an important means of achieving the purposes of Title VII and the Fourteenth Amendment.

1. *Respondent's affirmative action plan is flexible and does not erect an absolute bar to advancement by nonminority applicants*

Respondent's affirmative action plan is similar to the flexible, narrowly tailored plans approved in the Court's prior cases. For example, the plan established flexible employment goals rather than unyielding quotas. See page 4 note 3, *supra;* see generally *Local 28 of the Sheet Metal Workers' International Ass'n* v. *EEOC*, No. 84-1656 (July 2, 1986), slip op. 52-53 (plurality opinion); *Fullilove* v. *Klutznick*, 448 U.S. 448, 473 (1980) (plurality opinion); *cf. Regents of the University of California* v. *Bakke, supra; United Steelworkers of Amer-*

[13] See U.S. Conference of Mayors, *Affirmative Action Programs in City Governments* (1986). Copies of this report have been lodged with the Clerk of the Court for its convenience, and served on petitioner.

ica v. *Weber*, *supra*. Indeed, the county unequivocally stated its opposition to quotas and its refusal to implement them unless ordered to do so by a court (J.A. 130).

Petitioner's assertion (Br. 41 (footnote omitted)) that "the goals were used * * * as if they were quotas" is unsubstantiated, and indeed directly contradicted by the plan itself and the testimony concerning the basis for the decision to promote Joyce. There is no evidence in the record demonstrating that nonminority applicants have always been denied jobs or promotions unless the plan's employment goal had been met, and the court of appeals expressly rejected petitioner's contention to that effect (Pet. App. 28a-29a).[14] Indeed, notwithstanding the underrepresentation of women in skilled craft positions at the time of trial, respondent predicted that it would fill only three of 55 new skilled craft positions with women during that year.

Gender was considered under respondent's plan only as an "additional positive factor in an otherwise qualified candidate" (Pet. App. 29a; see Tr. 25). In this respect, respondent's plan closely resembles the "Harvard Plan" described approvingly by Justice Powell in *Bakke* (438 U.S. at 316-318):

> In such an admissions program, race or ethnic background may be deemed a "plus" in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats.
>
> * * * *

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[14] Petitioner does not even attempt to cite support for his claim (Br. 43) that a minority or a woman would always be promoted over a white male, and it is belied by the evidence in this case. Respondent is entitled to a presumption that it is applying the "plus factor" approach in good faith and not "as a cover for the functional equivalent of a quota system" (*Bakke*, 438 U.S. at 318 (Powell, J., announcing the judgment of the Court)). The court of appeals found that the "record contains no evidence" of "a distinct pattern of exclusion of non-minority candidates from such positions [as road dispatcher]" (Pet. App. 29a).

> This kind of program treats each applicant as an individual in the admissions process. The applicant who loses out on the last available seat to another candidate receiving a "plus" on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname. It would mean only that his combined qualifications, which may have included similar nonobjective factors, did not outweigh those of the other applicant.

Id. at 316, 317; see also *Sheet Metal Workers*, slip op. 52-54 (plurality opinion); *Weber*, 443 U.S. at 208. Thus, under respondent's plan and the director's decisionmaking process, petitioner presumably would have received the promotion if he had been significantly more qualified than Joyce because Joyce's gender would not have outweighed those additional qualifications. As it was, the scores were very close, and gender was enough to tip the balance in Joyce's favor.

Moreover, respondent's plan provided that most of the opportunities for women and minorities would be made available through the creation of new positions within the Agency. See J.A. 59-60; see generally *Weber*, 443 U.S. at 198 (affirmative action related to "newly created in-plant training programs"). Thus, no one was to be fired to make room for additional women and minorities. *Cf. id.* at 208. And, as the court of appeals concluded (Pet. App. 24a-25a), the plan was not shown to be a permanent fixture designed to maintain a particular balance. Rather, it is a temporary measure designed to "eliminate manifest * * * imbalance" and thus to eradicate the effects of prior discrimination. See *Sheet Metal Workers*, slip op. 53 (plurality opinion); *Weber*, 443 U.S. at 208.[15]

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[15] In any event, whether the plan might turn out to be permanent after all is irrelevant to this case. At the time that the hiring decision in issue here was made, it was clear that the effects of prior gender discrimination had not been eliminated. Petitioner's speculation that the plan might remain in effect after the need for it has passed cannot provide the basis for arguing that a decision

2. *Affirmative action in connection with promotions is substantially less burdensome than affirmative action in connection with layoffs*

Petitioner and his *amici* argue that the denial of his promotion is comparable to a layoff and that respondent's decision is therefore especially vulnerable. See Pet. Br. 36; U.S. Br. 28-29; see generally *Wygant* v. *Jackson Board of Education*, *supra*. This characterization is erroneous for a number of reasons.

First, the failure to obtain a promotion does not cause the extreme economic deprivation of a layoff. See *Wygant*, slip op. 14 (plurality opinion) ("Denial of a future employment opportunity is not as intrusive as loss of an existing job."); see also *Sheet Metal Workers*, slip op. 6 (Powell, J., concurring in part and concurring in the judgment). Petitioner continued to be employed by respondent and did not suffer any loss in his position or its associated benefits.

Second, hiring and promotion goals do not "disrupt * * * settled expectations" (*Wygant*, slip op. 14 (plurality opinion)) to the extent that layoffs do. Unlike the protections that labor contracts normally provide against layoffs, the county's civil service rules did not guarantee promotions to the most senior employee or to the one most "qualified" under the Agency's rating system. Rather, the director was entitled under the county's civil service rules to hire any one of the seven qualified candidates and clearly could have hired Joyce over petitioner without being subject to suit if Joyce were a man. Thus, while petitioner commendably sought to advance within the Agency, he had no legal or contractual basis for assuming that he would in fact be promoted to road dispatcher at the next vacancy.[16]

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made before that time has arrived is invalid. See generally *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424 (1976).

[16] Indeed, after the first round of interviews petitioner was not the highest-ranked applicant (Pet. App. 18a). The record apparently does not disclose what happened to the candidate who ranked

Third, promotion goals, like hiring goals, "impose a diffuse burden, often foreclosing only one of several opportunities," unlike layoffs, which impose a direct and substantial burden on "particular individuals" (*Wygant*, slip op. 14-15 (plurality opinion)). While petitioner did not obtain the particular promotion in issue, he kept his job and could have had other opportunities for advancement. Indeed, petitioner suffered less injury than would an unemployed nonminority who is not hired for an entry-level position because a minority is hired under an affirmative action plan.

Finally, the Court has recognized that hiring decisions are plainly less intrusive than layoffs (see *Wygant*, slip op. 13-15 (plurality opinion)). As noted above, the burden imposed by affirmative action promotion goals is diffused throughout the entire community of qualified persons, just as it is with respect to hiring goals. Thus, there is little basis on which to make a dispositive distinction between promotion decisions and hiring decisions. *Cf. Local No. 93, International Ass'n of Firefighters* v. *City of Cleveland* (*Vanguards*), No. 84-1999 (July 2, 1986) (approving entry of consent decree providing for hiring and promotion goals).

B. A Substantial Statistical Disparity Provides An Adequate Basis On Which An Employer May Conclude That Remedial Action Is Appropriate

1. *Statistical evidence is highly probative of past discrimination*

This Court has consistently recognized that a statistical imbalance in an employer's work force "is often a telltale sign of purposeful discrimination * * *. Evidence of longlasting and gross disparity between the composition of a work force and that of the general population thus may be significant * * *." *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 340 n.20 (1977). See also *Hazelwood School District* v. *United States*, 433

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first following the initial examination or to the candidate who was tied with petitioner at that point.

U.S. 299, 307-308 (1977) ("Where gross statistical disparities can be shown, they alone may constitute prima facie proof of a pattern or practice of discrimination."); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 805 (1973); *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). Just last Term, in *Bazemore* v. *Friday*, No. 85-93 (July 1, 1986), the Court reaffirmed the importance of statistical evidence in Title VII cases. Accordingly, petitioner and his *amici* are simply wrong in suggesting (Pet. Br. 24-32, U.S. Br. 16-17, 23-24) that reliance on a statistical disparity is unrelated to the determination whether there may have been actual discrimination by the employer.

The gross statistical disparity shown in this case—238 men and no women in the Road Operations Division's skilled craft positions, while women comprised 36% of the local labor force—thus provided a reasonable basis for concluding that affirmative action was appropriate to remedy past discriminatory employment practices. Indeed, evidence of such a statistical disparity might well form the basis for a prima facie case of a practice or pattern of discrimination. To be sure, there apparently was no direct evidence of the percentage of qualified women in the local labor pool, as normally would be required to establish a prima facie case. Nonetheless, such a striking disparity may, unless pervasively refuted by other evidence, provide a reasonable basis for inferring prior discrimination. As the Court stated in *International Bhd. of Teamsters*, "nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which the employees are hired" (431 U.S. at 340 n.20). See also, *e.g.*, *Bazemore* v. *Friday*, slip op. 13 (Brennan, J., for a unanimous Court, concurring in part) (discrimination need not be proven with "scientific certainty"); *Wygant*, slip op. 6 (plurality opinion).

2. *The Court has recognized that affirmative action may be justified on the basis of statistical evidence*

From its earliest decisions upholding affirmative action to the cases decided last Term, the Court has confirmed that a gross statistical disparity in an employer's work force provides a suitable justification for appropriately tailored affirmative action. In *Weber*, the Court upheld a plan intended "to eliminate traditional patterns of racial segregation" (443 U.S. at 201). In his concurring opinion, Justice Blackmun stated that he favored a standard under which affirmative action could be justified on the basis of evidence showing that an employer had committed an "arguable violation" of Title VII (*id.* at 211). He noted, however, that the two standards would converge in practice to the requirement of statistical evidence sufficient to establish a prima facie case of discrimination (*id.* at 213).

Similarly, in *Fullilove* v. *Klutznick*, *supra*, the Court upheld affirmative action in federal contracting based on congressional findings of a "marked statistical disparity" between the percentage of minorities in the general population and the percentage of federal contract funds going to minorities (448 U.S. at 459 (plurality opinion); see also *id.* at 502-503) (Powell, J., concurring)). The Court did not require specific evidence of the percentage of qualified minorities in the work force.

Finally, in *Wygant*, the plurality stated that affirmative action could be taken where there is "sufficient evidence to justify the conclusion that there has been prior discrimination" (slip op. 9). It reasoned (*id.* at 6) that a "statistical disparity" in an employer's work force can be sufficient to demonstrate "prior * * * discrimination" by the employer, citing *Hazelwood School District* v. *United States*, *supra*. Justice O'Connor similarly explained that "demonstrable evidence of a disparity between the percentage of qualified [minorities in the employer's work force] and the percentage of qualified minorities in the relevant labor pool sufficient to support

a prima facie Title VII pattern or practice claim by minority" applicants would provide "a compelling basis for * * * conclud[ing] that implementation of a voluntary affirmative action plan is appropriate to remedy apparent prior employment discrimination" (slip op. 9 (opinion concurring in part and concurring in the judgment)).[17]

3. *It would place employers in an intolerable position if they could not voluntarily take remedial action on the basis of evidence that is likely to expose them to liability to minorities*

The Fourteenth Amendment and Section 703(a) of Title VII establish as a fundamental principle that employers must not discriminate on the basis of race, gender, or certain other characteristics. In attempting to comply with this proscription, employers are confronted with the difficult task of alleviating the effects of prior discrimination on minorities and women without unduly impinging on the interests of nonminorities and men. There is no simple solution. On the one hand, affirmative action cannot be eschewed: "In order to get beyond racism, we must first take account of race. There is no other way." *Bakke*, 438 U.S. at 407 (opinion of Blackmun, J.). On the other hand, preferential treatment of some may mean that others are disadvantaged, an outcome that obviously should be minimized to the extent reasonably possible.

This case can, however, be decided on a clear and justifiable middle ground: an employer should be able to undertake limited affirmative action measures, in the

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[17] This case does not present questions concerning the evidence that would be required to justify more intrusive affirmative action or whether some lesser, or different, evidentiary basis might justify hiring or promotion preferences in other circumstances. In particular, this case does not concern the showing necessary to justify affirmative action with respect to positions, such as law enforcement officers, where a racial and ethnic balance reflecting that of the community might be desirable for reasons unrelated to remedying prior employment discrimination.

nature of flexible, realistic hiring or promotion goals, on the basis of "demonstrable evidence of a [statistical] disparity * * * sufficient to support a prima facie Title VII pattern or practice claim" (*Wygant*, slip op. 9 (O'Connor, J., concurring in part and concurring in the judgment)). If an employer is not allowed this measure of discretion, it cannot voluntarily remedy past discrimination or mitigate its potential liability to minorities.

C. Requiring An Employer To Prove That It Had Engaged In Purposeful Discrimination Would Be Unworkable And Unwise

Neither petitioner nor his *amici* expressly disagree with the standard described above. They would, however, eviscerate the ability of employers to undertake affirmative action in accordance with this standard by imposing the additional requirement that the employer prove its own past discrimination. Such a requirement is inconsistent with the Court's precedents, would serve no useful purpose, and is completely unworkable. An employer should be able to justify remedial action by relying on the same sort of statistical evidence which could be used by a minority employee or applicant as the basis for a Title VII action against the employer. If its affirmative action is then challenged in court, the plaintiff should be required to prove that, notwithstanding a substantial statistical disparity, the employer lacked a reasonable basis for concluding that affirmative action was needed to remedy prior discrimination. *Wygant*, slip op. 9-10 (O'Connor, J., concurring in part and concurring in the judgment).

1. *Voluntary compliance with Title VII is the preferred course*

The Court reaffirmed last Term that "Congress intended for voluntary compliance to be the preferred means of achieving the objectives of Title VII" (*Vanguards*, slip op. 12). And where there has been prior discrimination in violation of Title VII, affirmative action "furthers

the broad purposes underlying the statute" (*Sheet Metal Workers*, slip op. 22 (plurality opinion)). Thus, appropriately tailored voluntary affirmative action is, and must remain, a significant means to the achievement of the goal of Title VII—a workplace free of the effects of discrimination. See *Weber*, 443 U.S. at 203-208.

In *Vanguards*, the Court held that Section 706(g) of Title VII does not preclude the entry of a consent decree providing for race-conscious hiring and promotion goals by a municipal employer. In reaching this conclusion, the Court attached substantial importance to Congress's intent "to avoid undue federal interference with managerial discretion" and to permit the difficulties raised by affirmative action to be " 'handled at a governmental level closer to the American people and by communities and individuals themselves' " (slip op. 17, quoting 110 Cong. Rec. 15893 (1964) (remarks of Rep. MacGregor) (additional quotation marks omitted)).

The same local governmental discretion to which the Court referred in *Vanguards* is at the heart of this case. While the Court did not address the requirements of Section 703(a) in *Vanguards* (see slip op. 14 n.8), the result in that case would be largely undone by interpreting Section 703(a) to bar the voluntary use of affirmative action under circumstances like those in this case. Use of consent decrees to resolve lawsuits is preferable in many respects to litigation to a judgment or to settlement by private agreement without court approval. See *id.* at 21 n.13. For a number of reasons, voluntary affirmative action undertaken before litigation has commenced is even more advantageous, particularly when the employer is a local government.

First, such voluntary action means that litigation and its associated costs and disruption may be avoided altogether. Second, voluntary affirmative action—unlike litigation—permits the involvement of the entire community in devising a plan that meets the community's needs. Measures may be publicly proposed and debated, facilitat-

ing reconciliation of opposing interests, within the limits set by law, through the political process. Third, affirmative action undertaken in this manner will generally be comprehensive, addressing at once the needs of all minority and nonminority groups within the community and allowing establishment of realistic overall goals in light of all the interests at stake. In litigation, by contrast, typically only one or perhaps two minority groups may be pressing claims for relief, and nonminority employees may not be represented at all. Such litigation may therefore result in inefficient piecemeal steps that cannot readily be adjusted to accommodate the rights of unrepresented minorities and nonminorities.

For these reasons, it would make little sense to foreclose local governments from voluntarily adopting limited affirmative action to alleviate the effects of prior discrimination. To require the employer to submit to litigation does not represent sound policy and clearly was not intended by Congress.

2. *Requiring employers to prove their own past illegal conduct would sharply curtail voluntary compliance with the law*

Under the standard proposed by petitioner and his *amici*, an employer would be required to prove that it had engaged in prior illegal discrimination in order to justify affirmative action. Statistics of the sort available here would not be sufficient—the employer would have to prove, with great precision (see U.S. Br. 20-21), that it had in fact discriminated in the past and the extent of that discrimination.

Such a standard is anomalous because it would require the employer to establish facts totally at odds with its interests outside of that particular case. Proof of past discrimination would be an admission against interest that could well provide the basis for liability to minorities. Moreover, it might be inconsistent with prior positions taken by the employer in good-faith defense of

litigation brought by such groups. See generally *Wygant*, slip op. 9 (plurality opinion).[18]

Few employers, if any, would be so foolhardy as to adopt an affirmative action plan if this were the law. Rather, employers would, as a practical matter, be required to forgo voluntary compliance and to wait instead for litigation. The result would be that local governments would face liability to minorities while not being able to take modest affirmative action to rectify the problem. The net result would be that realization of the objectives of Title VII would be delayed or never achieved as discrimination could be removed from the workplace only by protracted and piecemeal litigation.

To avoid this result, the lower federal courts in Title VII cases brought by minorities have developed a privilege covering an employer's documents that evaluate its compliance with Title VII and the impact of its affirmative action programs.[19] As one court has put it,[20] "the incentives for any institution to engage in self-evaluative investigation pale considerably with the knowledge that the results may be used against it." Accordingly, "affirmative action plans are not discoverable in racial discrim-

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[18] Respondent, for example, was defending a discrimination claim brought by a class of women at the time of the trial in this case.

[19] See, *e.g.*, *Banks* v. *Lockheed-Georgia Co.*, 53 F.R.D. 283, 285 (N.D. Ga. 1971); *Webb* v. *Westinghouse Electric Corp.*, 81 F.R.D. 431, 433-434 (E.D. Pa. 1978); *Rosario* v. *New York Times Co.*, 84 F.R.D. 626, 631 (S.D.N.Y. 1979); *Roberts* v. *National Detroit Corp.*, 87 F.R.D. 30, 32 (E.D. Mich. 1980); *O'Connor* v. *Chrysler Corp.*, 86 F.R.D. 211, 216-218 (D. Mass. 1980); *McClain* v. *Mack Trucks, Inc.*, 85 F.R.D. 53, 58 (E.D. Pa. 1979); see generally Note, *The Privilege of Self-Critical Analysis*, 96 Harv. L. Rev. 1083, 1089-1090 (1983). But see *Resnick* v. *American Dental Ass'n*, 95 F.R.D. 372 (N.D. Ill. 1982). Even if a state statute might permit access to certain governmental documents that would be protected in the case of a private employer, the rationale behind the privilege remains directly relevant.

[20] *O'Connor* v. *Chrysler Corp.*, 86 F.R.D. at 217-218.

ination employment cases." [21] To require an employer actually to prove its own prior discrimination would erect an even greater obstacle to voluntary efforts designed to achieve compliance with the law than would discovery of internal evaluations of that subject.[22]

Moreover, requiring the employer to prove its own past discrimination would be inconsistent with the only affirmative action case in which the Court has given significant attention to the question, *Wygant* v. *Jackson Board of Education*, *supra*. Several of the opinions in *Wygant*, expressing the views of a majority of the Court, establish that, once a plaintiff has made out a prima facie case, the employer satisfies its burden by introducing evidence that its plan had a legitimate remedial purpose, by producing, for example, statistical evidence of the sort already discussed. It is then up to the plaintiff to show that this evidence is insufficient to support the plan, *i.e.*, that the employer did not have a reasonable basis for concluding that it could be found to have discriminated in the past, or that the plan is not appropriately limited. See slip op. 9-10 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 9 (plurality opinion) (employer must have "a strong basis in evidence for its conclusion that remedial action was necessary," but "[t]he ultimate burden remains with the employees to demonstrate the unconstitutionality of an affirmative action program"); *id.* at 11 (Marshall, J., dissenting) ("[t]he Court is correct to recognize, as it does today, that formal findings of past discrimination are not a

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[21] *McClain* v. *Mack Trucks, Inc.*, 85 F.R.D. at 58.

[22] The generally accepted contours of the self-evaluative privilege are strikingly similar to the position that we advance here: hiring and employment statistics are discoverable, but the employer's subjective evaluation of those statistics is not. See, *e.g.*, *Webb* v. *Westinghouse Electric Corp.*, 81 F.R.D. at 433-434. Here as well, we urge that the employer's statistical record is a proper basis for affirmative action (because it is probative of prior discrimination), but that requiring the employer to take the additional step of interpreting those statistics and proving its own discriminatory conduct is inappropriate.

necessary predicate to the adoption of affirmative-action policies"). See also pages 17-19, *supra*.[23]

3. *Placing the burden of proof on employers would serve no legitimate purpose*

Petitioner offers virtually no justification for imposing on employers the burden of proving their own prior discrimination. The United States, however, suggests several purported justifications in an argument that is wholly inconsistent with the views that it expressed in *Weber*.[24] These proposals are abstract and theoretical

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[23] This allocation of the burden of proof also is consistent with that established by the Court in traditional Title VII cases. In those cases, once the employer has, in response to the plaintiff's prima facie case, articulated a legitimate nondiscriminatory reason for its actions, the burden is on the plaintiff to prove that this reason was actually a pretext for discrimination. See, *e.g.*, *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802-804 (1973).

[24] The United States claims (Br. 17 n.10, 18) that its present position is consistent with the position it advanced in *Weber*. An examination of the federal government's briefs in *Weber* demonstrates the contrary; in fact, the United States then urged precisely the position that we now support and it now opposes:

> Nor would the purposes of [Title VII] be served by requiring an employer to admit and prove its own violations of the law in order to justify remedial action of this nature. Such a requirement would plainly discourage voluntary compliance. Instead, it would leave an employer in the awkward posture of having to await litigation charging discrimination against minorities while being prohibited from taking steps that would help remedy the effects of its apparent past acts of discrimination. Title VII does not compel such a result.

Brief for the United States and EEOC in *United Steelworkers of America* v. *Weber*, O.T. 1978, No. 78-432, at 19.

> [I]f the evidence suggests that a plaintiff could establish a *prima facie* case and that the defendants do not have an obviously convincing rebuttal, then they should be permitted to confer remedial priorities as a court would were it to adjudicate the case and find unlawful behavior.

Reply Memorandum for the United States and EEOC in *Weber*, at 6-7 (quotation marks omitted).

straws, which fail to take into account the realities of governing at the local level. None of the purported justifications withstands scrutiny.

First, the United States suggests (Br. 16) that, if the ultimate burden of proof were not placed on the employer, the question of remedial purpose would become "a mere matter of statistical balance after all." This contention, however, ignores the fact that a substantial statistical disparity is in itself highly probative of actual discrimination. See pages 16-17, *supra*. Moreover, the plaintiff retains the opportunity under the approach we support to show that, under the particular circumstances, there is no reasonable basis for concluding that such a disparity was caused by the employer's discrimination.

Second, the United States argues (Br. 20) that requiring an employer to prove its own prior illegal conduct would create a "tension" that is "both manageable and useful." In fact, it is neither. As we have explained, imposition of such a burden would erect an insurmountable barrier to the adoption of voluntary affirmative action programs. The United States does not offer any reason for supposing that employers would willingly subject themselves to the disruption and potential liability that its proposed approach would entail.[25]

The use that the United States believes the "tension" would serve apparently is twofold. It allegedly would cause employers to hesitate before embarking on affirma-

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[25] In fact, the federal government's description (Br. 22) of the circumstances under which employers would not be left on the "'tightrope'" of liability to minorities if they do not act and liability to nonminorities if they do supports precisely our position. The United States urges (*ibid.*) that the dilemma will not exist where "there is an insufficient basis for concluding that discrimination has occurred." Yet a statistical disparity of sufficient magnitude to establish a prima facie case could of course present an adequate basis for such a conclusion and, accordingly, would support an employer's judgment that a "serious threat of litigation [by minorities] exists" (*ibid.*).

tive action programs and thereby prevent "casual social engineering" (U.S. Br. 20). According to the federal government, it also would ensure that affirmative action is "kept to the minimum necessary to accomplish the remedial objective" (*id.* at 21). In fact, the typical affirmative action plan implemented by a local government, like respondent's plan at issue here, is not adopted hastily or cavalierly. Rather, such plans are generally adopted only after serious thought and with due regard for the interests of all members of the community. Indeed, it could scarely be otherwise in an area so controversial and with so direct and varied an impact on the local citizenry.

Nor are local governments likely to exceed proper bounds in taking affirmative action. The United States cites no basis for its suggestion (U.S. Br. 20) that local governments routinely engage in "gratuitous" discrimination through over-ardent affirmative action.[26] The political realities of policy development by local decisionmakers directly responsible to the electorate in fact suggest precisely the opposite.[27] Moreover, the legal rule for which we argue requires local governments to tailor their efforts to correction of past discrimination, and this should be sufficient to keep affirmative action within proper bounds.

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[26] We strongly object to the federal government's repetition (Br. 20) of the inappropriate suggestion, advanced previously in its *amicus* brief in *Vanguards*, that governments of cities in which minorities are politically powerful will unfairly discriminate in favor of minorities. We would reject, and we presume that the United States would reject, any suggestion that officials of cities in which minority groups are not politically dominant routinely discriminate against minorities. There is no basis for assuming the converse to be true.

[27] Moreover, public-sector collective bargaining procedures required by statutes in a majority of states ensure that the interests of nonminority union members will be respected when affirmative action plans are considered by local governments. The duty to bargain imposed by these statutes typically will prevent adoption of an affirmative action plan without consultation with employee representatives. Such consultation (as well as binding arbitration where applicable) can be expected to check implementation of proposed plans that are either unnecessary or overbroad.

Finally, the United States urges (Br. 21) that its allocation of the burden of proof would have "the beneficial function of leading to permanent, meaningful reform in the employer's practices." Thoughtful scrutiny and needed revision of employment practices are far more likely to occur, however, when an employer takes voluntary steps to remedy in a comprehensive way problem practices that it has identified—including those that have led to substantial statistical disparities—than when it is confronted with the need to defend against litigation challenging an affirmative action plan.

Thus, permitting voluntary affirmative action under the approach we propose is most consistent with achieving the ultimate goal of Title VII and the Fourteenth Amendment, which is to eliminate discrimination.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

PAUL E. JOHNSON,

Petitioner,

v.

TRANSPORTATION AGENCY, SANTA CLARA COUNTY, CALIFORNIA, *et al.*,

Respondents.

On Writ of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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BRIEF FOR THE AMERICAN SOCIETY FOR PERSONNEL ADMINISTRATION AS AMICUS CURIAE SUPPORTING RESPONDENTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1129

PAUL E. JOHNSON,

Petitioner

v.

TRANSPORTATION AGENCY, SANTA CLARA COUNTY, CALIFORNIA, *et al.*,

Respondents

On Writ of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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BRIEF FOR THE AMERICAN SOCIETY FOR PERSONNEL ADMINISTRATION AS AMICUS CURIAE SUPPORTING RESPONDENTS

Consent to Filing

This Amicus brief is filed pursuant to Supreme Court Rule 36.2, with the written consent of all parties. Letters to that effect have been filed with the Clerk of this Court.

Interest of the Amicus Curiae

The American Society for Personnel Administration (ASPA) is the world's largest association of personnel and human resources professionals, representing over 35,000

members in business, government, and education dedicated to the furtherance of personnel and human resource management. Accordingly, ASPA and its members have an interest in the orderly development and enforcement of the myriad laws and regulations which govern every aspect of employment.

As the major association of the human resources profession, ASPA is vitally concerned with the orderly development of the law regarding affirmative action and its proper role in the workplace. ASPA has long advocated that properly implemented affirmative action is one of the best means of achieving a productive and equitable workplace. Thus, ASPA believes that this case provides the proper vehicle for this Court to articulate an appropriate balance between the compatible goals of providing equal employment opportunities and promoting desegregation in the workplace.

Statement of Facts

The Respondent, Transportation Agency, Santa Clara County, a public employer covered by various equal employment opportunity and affirmative action mandates, was called upon to fill a single vacancy for a road dispatcher in its Road Operations Division.

Santa Clara County governed its personnel function in accordance with merit system rules. Those rules provided that positions such as road dispatcher would be filled after an analysis of job requirements, applicants' backgrounds and test scores produced a list of qualified, eligible applicants from which the selecting official would choose the successful candidate. The Santa Clara merit system rules did not require the selection of the individual who received the highest rating on any one of the selection steps. Nor was the selecting official required to accede to the recommendation of any of the panels involved in the rating

process. The selecting official was only required to select the successful applicant from the list of eligibles.

At the time the road dispatcher job in question was being filled, the Santa Clara County civil service system was operating under an affirmative action plan ("AAP") designed to increase the utilization (employment) of minorities, women and disabled persons in all civil service job categories and job titles in Santa Clara County. The Transportation Agency was included within the scope of the County AAP and had its own specific AAP as well. The 1979 County AAP established a long-range goal for the total County work force of equating the distribution of women, minority and disabled persons working for the County with the distribution found in the Santa Clara County area work force (J.A. 59, 121). The 1979 County AAP provided that the long range goals would be modified pursuant to the 1980 census to reflect changes in the composition of the County's workforce. Further, the 1979 County AAP provided for a review mechanism to determine if individual goals for "protected groups" would be necessary (J.A. 124). The AAP further required that hiring goals be established for individual agencies on the basis of job availability, expected turnover, and the availability of women, minorities or disabled persons possessing "the desired qualifications or potential for placement." Individual Agency goals did not have to match the County-wide goal. The AAP specifically provided that the goals were "not to be construed as quotas that must be met" (J.A. 64, 123).

The Santa Clara Transportation Agency established an affirmative action plan pursuant to the County plan and in accordance with federal guidelines promulgated for grantees by the Urban Mass Transportation Agency (J.A. 30, 39). The County and Agency AAPs recognized that the attainment of the ultimate goal for utilization of females in skilled craft jobs would entail a long-term effort (J.A. 34).

The road dispatcher job at issue in this case was a non-critical, skilled craft job requiring an ability to schedule and coordinate road construction jobs including equipment and worker assignments, an ability to handle two-way radio equipment, and an ability to keep accurate records. Applicants had to have either four years of related road dispatching experience or four years of road maintenance work with County of Santa Clara (J.A.24). In response to a vacancy notice, the County received 12 applications for the position, 9 of which met the minimum background requirements. These nine applicants were each given an oral examination by a two person review Board. Seven of the applicants received the cut-off score of 70 or higher and were placed on the eligible list. One eligible candidate scored 80 points. Petitioner received a score of 75, tied for second place on the list with another male. Diane Joyce, the only female candidate, received a score of 73 (rounded-up from 72.5) placing her immediately behind Petitioner (J.A. 26). The job announcement did not provide that applicants would be ranked on the basis of their scores. At a second oral review before another panel of three employees, Petitioner was recommended for selection. The record does not indicate that the test procedures, the questions asked, or the scoring system employed by either panel were validated as job related in accordance with either professionally accepted validation procedures or federal guidelines. Nor was there any evidence that the difference between Petitioner's score of 75 on the initial examination and Ms. Joyce's score of 73 was a significant difference rather than one within the range of error inherent in the examination and scoring procedure.

The selecting official considered the qualifications of the applicants, the guidance provided by the County and Agency affirmative action programs, and the recommendations of both the Agency's affirmative action coordinator and its Road Operations Divisions Director. Based on all

of these considerations, Diane Joyce was selected for the position of road dispatcher (J.A. 28).

Issue Presented

> May an employer promote a fully qualified female applicant to a craft position after consideration of applicants' qualifications, job requirements, agency affirmative action policies and equal employment data indicating severe underutilization of females.

Summary of Argument

In terms of its facts, the case before the Court is a simple one. The Santa Clara County Transportation Agency had to fill by promotion a single opening for a road dispatcher. Following its normal personnel practices, a list of eligible, qualified candidates was presented to the Agency Director. The Agency Director did not follow the recommendation of one of the employee panels involved in the process, but instead selected another fully qualified candidate, Diane Joyce.[1]

This unexceptional personnel process was conducted in the context of an Agency affirmative action program designed to increase the utilization of minorities, women and disabled persons in its work force. The Agency AAP followed County guidelines designed to increase employment opportunities at all levels of County employment. The plan specifically provided that outreach efforts, including hiring goals where deemed necessary, were to focus on individuals who possessed the necessary skills for the available jobs or who had the potential for acquiring the skills. Further, the plan specifically disclaimed any suggestion that

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[1] Subsequently, however, Petitioner was also promoted to the position of road dispatcher. See Agency's Brief In Opposition To Petition For a Writ of Certiorari, p. 6 fn. 4.

its goals were quotas which had to be met regardless of skill or availability. Goals would be met only if qualified persons within the protected groups were available.

Neither the County plan, the Agency plan or the facts of the case before the Court reveal any deviation from accepted practices by employers mindful of their obligation to provide equal employment opportunities. Neither the County nor the Agency established lower selection criteria for individuals who were members of "protected groups." No additional points were given to women who applied for positions in which they were statistically under-represented, even though public policy has encouraged employers to increase their utilization of women. The Agency did not keep separate lists of eligible women, minorities or disabled persons from which jobs were to be filled in some preordained, proportional sequence. Jobs were not reserved or set aside for women, minorities or disabled persons. Compare *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979); *Local 93, Firefighters v. City of Cleveland*, 478 U.S. ___, 92 L.Ed. 2d 405 (1986); *Fullilove v. Klutznick*, 448 U.S. 448 (1980). In fact, in the case at bar, the affirmative action plan merely encouraged the selecting official to take a second look at each of the qualified applicants who came before him via the standard operating procedures of the County personnel system. The selecting official was guided by the long range goal and interim hiring goal, but was under *no* mandate to base his decision on either. Based on this review, he chose an eminently qualified female.

In contrast to the spectre raised by Petitioner and his amici of wild-eyed social engineering run amok, the facts before the Court suggest no effort by the County to engage in detailed numerical race or gender balancing. Rather, in filling a craft job for which no exceptional qualifications were required, the Transportation Agency chose a well-qualified individual with long service to both the County and the Agency. This hiring decision is before the

Supreme Court of the United States only because the individual selected, Diane Joyce, is a woman, and because the selecting official was cognizant of the disastrous track record of his Agency with respect to employment opportunities for women. The modest efforts of the Agency to begin to rectify the glaring absence of females in its skilled craft positions should be applauded, not outlawed, by this Court.

The vast disparity between the number of employees in the skilled craft category (238) and the number of women in that group (0) was more than sufficient to cause the Agency to be concerned with its obvious underutilization of women and its potential legal liability. The earliest cases sustaining claims of discriminatory personnel practices turned on numerical disparities not as significant as the disparity faced by the Santa Clara County Transportation Agency. See *Hazlewood School District v. United States*, 433 U.S. 299 (1977). However, it is not necessary to decide whether the failure to promote a woman to the job of Road Dispatcher in the present case would have led to legal liability in order to understand the obvious concern and vulnerability felt by the County and Agency.

In the face of the extraordinary absence of *any* female skilled craft employees, the action of the County was exceedingly moderate. It simply permitted the normal operation of its personnel system to designate a group of fully qualified individuals, and then selected a qualified female candidate. That this modest nod toward the concept of affirmative action has been deemed by Petitioner and his several amici as violating principles of equality and merit selection is wholly unsupportable. The action by the Transportation Agency was not the straw of affirmative action that broke the camel's back. Rather, it was the belated placement of the very first straw in a large, empty basket on the camel's back. Surely camels can support much greater weight before even beginning to sense a

burden from such modest measures in the name of affirmative action.

The discussion of the *Weber* decision offered by Petitioner and his amici is barely relevant to the facts of this case. Petitioner offers a strictly mechanistic application of the *Weber* decision, focusing on the alleged absence of some "key" elements to support its claim that the County's and Agency's AAPs fall outside of the *Weber* umbrella. This argument disregards the factual basis which led to the onerous affirmative action plan adopted jointly by the Kaiser Company and its Union. Contrast the aggressive AAP in *Weber* with the relatively leisurely commitment made by the Agency to rectify the complete absence of females in skilled craft positions. The County's reasonable effort to begin to integrate its skilled worker classifications was an example of a modest affirmative action policy wholly within the scope of permissible affirmative action as defined by this Court.

Argument

A. The Issue of the Relative Qualifications of Petitioner and Diane Joyce Has Been Misconstrued By the District Court and Petitioner.

In its findings of fact, the District Court determined that Petitioner was better qualified than Diane Joyce. (Finding of Fact No. 18.) The District Court apparently reached this finding, which contradicted that of the selecting official, by reviewing the reported scores of the applicants and the recommendation of one of the two reviewing panels. The Court of Appeals did not review this finding. Nevertheless, understanding the many uncertainties inherent in any judgement as to the relative qualifications of Petitioner and Diane Joyce is critical to understanding the operation and impact of the County's affirmative action plan.

It is a standard tenet of personnel administration that there is rarely a single, "best qualified" person for a job. An effective personnel system will bring before the selecting official several fully-qualified candidates who each may possess different attributes which recommend them for selection. Especially where the job is an unexceptional, middle-level craft position, without the need for unique work experience or educational attainment and for which several well-qualified candidates are available, final determinations as to which candidate is "best qualified" are at best subjective. Indeed, the County's own system was so designed. The road dispatcher job announcement did not provide that selection would be based solely on a test score or a panel recommendation (J.A. 24). There is no evidence before the Court showing that the 2.5 point differential between Petitioner and Diane Joyce after the initial oral interview was significant by any measure.[2] Nor did Petitioner introduce evidence that the second reviewing panel, which based its recommendation for selection on the responses of the candidates to six questions, received any instructions as to how it should rate the answers of applicants or the criteria it should follow in developing its recommendation. In short, there is simply no valid, reliable basis for concluding that Petitioner was more qualified than Diane Joyce.

Rather, the District Court made its determination that Petitioner was "best qualified" because of his 2.5 point margin over Ms. Joyce on an unvalidated, oral examination and the wholly subjective, unvalidated judgment of a second panel of three employees. Petitioner and his amici mischaracterize the basis for the recommendation of Petitioner in an attempt to create the impression that the Agency's personnel system was designed to produce one uniquely qualified candidate whose rejection would subvert

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[2] See A. Anastasi, *Psychological Testing* (Third Edition, 1968) Chapter 3. "The Interpretation of Test Scores: Norms and Their Uses."

the entire selection process. Petitioner and his amici would like the Court to think that the selecting official turned to a group of second rate, discarded candidates in order to satisfy an unblinking quota system requiring the selection of a woman. In light of the true facts, such a characterization cannot command serious respect.

Petitioner insists that he was the "best qualified" candidate despite the fact that Respondent's selection procedure was designed to leave that determination within the sound discretion of the selecting official. The selection process led to a "recommendation" by a panel of three employees suggesting that Petitioner be selected. While the assumption can be made, though unsupported by specific evidence, that the panel recommending him believed Petitioner was "best qualified" in some sense closely related to the job of road dispatcher, it may have recommended him for some entirely different reason.[3] The District Court had no basis for deciding whether the factors considered by the second panel in reaching its decision to recommend Petitioner were compelling enough to raise legal doubt regarding the decision of the selecting official to disregard the recommendation. All the record shows is that the second panel thought Petitioner should be selected. It requires a major leap of faith to conclude that the absolute qualifications of the candidates were thereby established.[4]

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[3] See R. Thorndike, *Personnel Selection* (1949): "Independence as a Problem in Determining the Reliability of Ratings and Subjective Evaluations," pp. 116-118.

[4] The efficacy of placing so much reliance on the second panel interview is brought further into doubt by the general lack of reliability of the process. One expert summarized the research this way:

> The inevitable conclusion derived from a number of investigations is that interview judgments, as they are usually made in the employment situation, are not closely related to independent measures of the characteristics judgment nor to measures of success on the

And even if the subjective selection process utilized by the County and the Agency could be construed to show that Petitioner was in some way the "best candidate," this determination would only have relevance if one presumes that the concept of rank ordering is the preferred means of selecting individuals for hiring or promotion for craft jobs. Rank ordering presumes that the differences between qualified candidates on a selection list are dispositive in determining who should be selected. Once this premise is established, a mechanistic striking process may be undertaken whereby a job is offered to the candidate with the highest score until the job is filled. But such presumptions should carry no weight in this case because there has been no showing that the Agency's selection process met the rigorous technical standards required for rank ordering selection, especially for the type of job being filled in the present case. See *Uniform Guidelines on Employee Selection Procedures*, 29 CFR Part 1607 § 1607.14C(9), Q & A No. 62.

The County personnel procedures did not provide for rank ordering. Rather, having established an eligibility cut-off score after the first test, the system created a pool of fully-qualified candidates eligible for selection within the discretion of the selecting official. The system was not designed to operate with such precision that, in the absence of judgment exercised by the selecting official, it would permit the conclusion that one eligible candidate was "better qualified" than another so as to mandate that candidate's selection.

Without evidence of any meaningful differences between the job-related qualifications of the Petitioner and Diane

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job. In an over-all sense, the evidence regarding the validity of the selection interview yields a distinctly disappointing picture.

Miner, J. B., The Selection Interview, at p. 46 reprinted in Hamner, W.C. and Schmidt, F.L., *Contemporary Problems in Personnel*, pp. 44-50 (rev. ed. 1977).

Joyce, it cannot be argued persuasively that the selection of Ms. Joyce violated the basic federal law prohibiting invidious employment discrimination on the basis of sex, or that it was unlawful for the Agency to follow a modest affirmative action plan designed to redress the absolute absence of women in the Agency's skilled craft jobs. Nor should such a sparse and unpersuasive record cause this Court to issue a decision which would nullify the long, national effort to afford equal employment opportunity and encourage full utilization of all members of the workforce. *Weber, supra.*

Personnel professionals in particular would view such an outcome with alarm. Faced with the demanding requirements of producing a highly productive workforce and complying with the myriad legal requirements of equal employment and workplace standards, personnel professionals must have the flexibility to weave together all of these requirements in order to conduct a lawful and effective personnel system. It is precisely this flexibility which has enabled our society to make major progress in desegregating our national workforce and utilizing more effectively the productive capacity of all Americans, regardless of their gender or color. Petitioner's argument and that of his amici, if adopted by this Court, would turn back the clock, reducing the human resources function to a clerical exercise whereby jobs would, in fact, be filled by the numbers.

B. The Vast Underutilization of Females For Skilled Craft Positions In the Transportation Agency Justified the Implementation of an Affirmative Action Program by the County and by the Agency.

Santa Clara County generally, and the Transportation Agency in particular, was faced with a serious underutilization of women in its workforce. Within the job group in which Petitioner and Diane Joyce competed for the position of road dispatcher, the underutilization was strik-

ing. There were *238 males* in the various job titles comprising the skilled craft category, but there were *0 females* in these skilled craft jobs. The magnitude of this disparity clearly justified, at the very least, the modest affirmative action followed by the Agency to begin to redress this disparity.

Whether the gross under-representation of women among the Agency's skilled craft workers rose to a level sufficient to support a determination of Title VII liability should not, however, be the deciding issue before the Court. Rather, the decisive issue is whether a gross statistical difference in the employment of females—238 to 0—is sufficient to justify the adoption and implementation of a modest affirmative action plan containing a numerical component. The majority below analyzed the relevant precedents and properly concluded that affirmative action may be taken without a prior finding of discrimination. *Johnson v. Transportation Agency, Santa Clara County, Calif.*, 748 F.2d 1308, 1313 (9th Cir. 1984).

The decision to institute modest affirmative action measures requires much less than an adjudication of liability for past discrimination. The issue is whether a gross underrepresentation of women or minorities should lead a vigilant human resources program to consider whether it has somehow screened out qualified individuals of common race or gender. This Court has consistently endorsed voluntary, remedial action by employers faced with this problem rather than awaiting the drawn out process of adjudication. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974); *Weber, supra.* By statute and regulation, these responses have been designated "affirmative action." In determining whether the degree of underutilization is sufficient to trigger an affirmative action effort, the analysis designed to determine a *prima facie* case of discrimination should be the approach. That analysis requires a comparison of utilization and availability consistent with appropriate labor market and job requirement considera-

tions. *Hazlewood School District, supra*; *Wygant v. Jackson Board of Education*, 476 U.S. ___, 90 L.Ed. 2d 1260 (1986) (O'Connor concurring). See 41 CFR Part 60-2. Once such an analysis is made, appropriate measures should be permitted to alleviate the disparity consistent with Title VII standards. Further, the degree and scope of affirmative action should be directed to the specific deficiencies uncovered. There is no single preferred form of affirmative action. See Policy Statement on Affirmative Action issued by U.S. Department of Justice, U.S. Department of Labor, E.E.O.C., Civil Service Commission, Commission on Civil Rights (1976), 29 CFR § 1607.17.

Such efforts may be structured to produce a broad, systemic revision of the personnel process. Only last term this Court reiterated the proposition that affirmative action programs need not be victim specific. *Wygant, supra*; *Firefighters, supra*. Indeed, such a requirement would be antithetical to the goal of a desegregated workforce. Affirmative action has always been viewed as distinct from the non-discrimination mandates of Title VII. *Contractors Association of Philadelphia v. Secretary of Labor*, 442 F.2d 159 (3rd Cir., 1971); See Comment, *The Philadelphia Plan, A Study In The Dynamics Of Executive Power*, 39 University of Chicago Law Review 723 (1972). In order to speed the process of equal opportunity, a dual system of corrective measures has been established. The necessity of redressing specific wrongs has been separated from the goal of creating more open, unbiased personnel systems. To require the extremely onerous, expensive and time consuming processes of Title VII administrative enforcement and adjudication as prerequisites for modest, voluntary affirmative action policies designed to correct gross underutilization could very well delay until the next century meaningful redress for undeniable employment inequities.

In many instances, including the County and Agency plans before the Court, affirmative action simply means the codification of professional personnel practices. Good

personnel practices promote job related standards for hiring or promotion. An employer is ill-served by having an employee who cannot adequately perform a job whether that employee is white, black, male, or female. Good personnel practices lead employers to broaden their applicant pool as much as possible so that as many qualified persons as possible will apply for vacancies. Employers, and indeed the entire economy, benefit from the opportunity to choose among competing, equally-qualified candidates. Good personnel systems track hires, promotions, transfers, and terminations in order to highlight situations in which the productive potential of employees is not being fully utilized. Certainly, the glaring lack of females in the Agency's skilled craft job category was a more than sufficient trigger for the Agency's modest affirmative action efforts. Sophisticated statistical analyses were not needed to show the County or the Agency that there was a problem. Computer driven models are not necessary to justify an affirmative action plan which encourages the selection of the first female where none of 238 workers in a skilled craft category is female.

The County and the Agency reacted to the evidence before them in an appropriate manner. With severe underutilization in many job groups, with a serious potential for liability because of this underutilization, and given the longstanding public policy favoring a fully integrated public work force, the Agency's modest affirmative action efforts were fully justified.

C. The Affirmative Action Plans Adopted By The County and the Transportation Agency Are fully Consistent With The Principles Established by This Court in *United Steelworkers vs. Weber.*

This Court has struggled with the acceptability of affirmative action plans for over a decade.[5] Mirroring our

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[5] See, e.g. *DeFunis v. Odegaard,* 416 U.S. 312 (1974).

society's laborious efforts to come to grips with the fundamental problem of equality, the Court has been faced with the need to review various legislative, regulatory and private responses in light of constitutional and statutory requirements. As oft-stated in statutory language and in the decisions of this Court, our ultimate goal is to have a color blind (and gender blind) society. However, in the long effort to reach this point, this Court has recognized that anti-discrimination laws permit, for a limited time and on a limited basis, color (and sex) conscious policies in order to undo the lingering effects of prior exclusion. *Weber, supra.* Fully cognizant of the need to carefully monitor these policies so as to avoid the substitution of a new wrong for an older one, this Court has established a framework by which to determine the acceptability of various affirmative action steps.

However, this Court has been careful to avoid setting down rigid, mechanistic formulas for acceptable affirmative action. The one constant in the Court's decisions has been an appropriate reluctance to announce universal affirmative action requirements. To do so would impose the burden of remedying a general social problem on each individual employer. Employers in different industries have different employment problems, as do employers in different geographical locations, employers with or without unions, and so forth. There can be no single method of response to underutilization, because there is no single cause, and no single form of the problem. The very diversity of our workplaces and our workforces demands individualized responses. In *Weber*, the Court took pains to explain that the opinion did not "define in detail the line of demarcation between permissible and impermissible affirmative action plans," (443 U.S. at 208). In the *Firefighters* case, Justice Brennan noted that the Court wasn't deciding "what limits 703 places on an employer's ability to agree to race-conscious relief in a voluntary settlement . . . or what showing the employer would be re-

quired to make concerning possible prior discrimination . . . in order to defeat a challenge by nonminority employees based on § 703." 92 L.Ed. 2d at 420, n.8.

With full cognizance of these cautions, the Court has, however, provided useful guideposts as to the characteristics of an acceptable voluntary affirmative action plan. It is clear that the legitimacy of a plan hinges in large measure on the underlying facts which led to the implementation of the plan by the employer. In *Weber*, only 5 of 273 skilled craft workers were black.[6] In view of this "conspicuous racial imbalance," a special training program was established which *required* that 50% of the trainees be black until the percentage of black skilled craft workers *equalled* the percentage of blacks in the local labor force. While selection for training was to be by seniority, blacks and whites were to be considered *separately*. The *Weber* plan was thus a stringent plan regulating the method of promotion from semiskilled to skilled positions. The plan established a goal of numerical parity and set forth a short timetable in which to achieve the goal. As Justice Blackmun observed, the Kaiser plan was temporary only because its mechanism for achieving strict racial parity was so stringent that attainment of its goal in a short period of time was guaranteed. 443 U.S. at 193, 216 (Blackmun concurring).

By contrast, in the instant case no automatic, mechanically-applied preferences were provided for any of the groups specified in the affirmative action plan. Nor was the plan any more permanent than the plan in *Weber*, though the Agency's more relaxed, thoughtful approach to attainment of its goal would necessarily mean that a longer period of time would pass before the goal is achieved.

In *Firefighter's*, the affirmative action plan also included a numerically based promotion formula whereby 50% of

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[6] In the instant case, none of the 238 skilled craft workers were women.

the promotions in the Cleveland Fire Department would be awarded immediately to minorities, with a decreasing number in the subsequent three years of the decree. Contrasting this formula with the exceedingly modest provisions of the plans adopted by the County and the Agency helps demonstrate the substantial deference which ought to be shown for the voluntary plan before the Court.

Thus, the guideposts enunciated by *Weber* and followed by the Circuits since *Weber* (see *Devereaux v. Geary*, 765 F.2d 268 (1st Cir. 1985) and cases cited therein) make plain that the Santa Clara plans fall well within permissible limits. Specific time frames as found in the *Firefighters* decree were not specifically set forth in the Agency's plan simply because the plan did not demand immediate attainment of its ultimate goal. The absence of such specifications also must be balanced by the fact that the Agency plan was much less intrusive into the normal operation of the County's personnel system and the ordinary rights and duties of employees within that system. Without terms which amounted to fixed quotas, such as in *Weber* and *Firefighters*, the County would naturally take longer to reach its ultimate goal and would be unable to predict when the goal might be achieved. Thus, in view of the type of plan adopted, setting forth a particular end date was not necessary as an indicator of the permissible nature of the plan.

The fact that *Weber* and *Firefighters* involved racial discrimination rather than sex discrimination as in the present case is of no legal import. Whether or not Congress focused as readily on the pernicious impact of sexual exclusion as it did on racial exclusion when it first passed Title VII is not an important issue. By establishing a legal framework for eradicating employment discrimination and including sex within the prohibited categories, the Congress intended that both forms of discrimination be prohibited and that the vestiges of prior exclusionary policies be eliminated. Separate standards do not apply to claims

of race and sex discrimination under Title VII, nor can separate standards apply when developing affirmative action policies to deal with the problem of serious underutilization.

Further, this Court's review should be no different because the instant case arises under § 703 rather than under § 706 as did *Firefighters* last term. The analysis of the court in *Firefighters*, *supra*, has equal weight with respect to a wholly voluntary affirmative action plan as it would in reviewing a plan endorsed or imposed by a court. As has often been repeated, without voluntary compliance the remedial purposes of Title VII will remain an elusive goal of national policy. *Gardner-Denver*, *supra*; *Weber*, *supra*; *Firefighters*, *supra*. Cumbersome procedural standards requiring that the Courts approve each voluntary plan would create an unimaginable nightmare of litigation. Employers would be well advised to do nothing rather than incur the tremendous costs and uncertainty of submitting their plans for judicial review.[7] Indeed, the very goal of non-intrusion into the management of human resources which so concerned the Congress when it adopted Title VII would be eviscerated. *Firefighters*, *supra*, at 422.

CONCLUSION

Consistent with public policy, statutory requirements and judicial precedent, the personnel profession has adapted its own practices to the great societal goal of equality in employment and helped fashion the process known as af-

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[7] It should be noted that for firms which employ the vast majority of employees, private or public, there is already a mechanism by which their affirmative action plans are subject to review. Executive Order 11246, as amended, covering federal contractors and subcontractors, federal grant programs which include affirmative action requirements, and various State regulations all set forth guidelines as to the appropriate scope and permissible limits of affirmative action. The concern that by permitting voluntary affirmative action employers would be free to engage in invidious practices has no basis.

firmative action. Notwithstanding inevitable abuses and false steps, affirmative action has enabled our society to achieve significant progress in the full utilization of its diverse workforce. The case before the Court presents a moderate and reasoned response by an employer to a serious problem of sex segregation. Were the Agency's response deemed to be improper, employers and their human resource managers would be precluded from resolving their own employment problems on reasonable terms. This result would be highly regressive. This Court must therefore announce unambiguously that reasoned, moderate efforts toward equality in the workplace should continue.

For all of the foregoing reasons, Amicus American Society for Personnel Administration respectfully urges this Court to affirm the decision below.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1129

PAUL E. JOHNSON,

Petitioner,

v.

TRANSPORTATION AGENCY, SANTA CLARA COUNTY, CALIFORNIA, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

The Equal Employment Advisory Council ("EEAC") respectfully submits this brief amicus curiae, pursuant to the written consents of the parties.[1]

INTEREST OF THE AMICUS CURIAE

EEAC is a voluntary nonprofit association organized to promote the common interest of employers and the general public in sound government policies, procedures and

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[1] Their consents have been filed with the Clerk of the Court.

requirements pertaining to nondiscriminatory employment practices. Its membership consists of a broad segment of the employer community in the United States, including both individual employers and trade and industry associations. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity (EEO) whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements.

Substantially all of EEAC's members, or their constituents, are employers subject to the provisions of Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e, *et seq.*), as well as other equal employment statutes and regulations. In addition, nearly all of EEAC's members are subject to the affirmative action requirements under Executive Order 11246, 30 Fed. Reg. 12319 (1965), *as amended* by 32 Fed. Reg. 14303 (1967) and 43 Fed. Reg. 46501 (1978). Finally, many of EEAC's members are signatories to collective bargaining agreements, Title VII settlements, conciliation agreements, consent decrees and other voluntary plans or programs which provide varying forms of remedial relief or affirmative action benefiting persons or groups covered by Title VII and other federal and state equal employment statutes, regulations and orders.

Most of EEAC's member representatives are charged with corporate responsibility for compliance with federal, state and local nondiscrimination laws. As equal employment officers, they must attempt to determine not only their companies' nondiscrimination and affirmative action obligations, but also the nature and extent of any remedial relief which may be necessary, as well as the potential liability which these obligations might create to nonminority employees and applicants.

EEAC's members are concerned about the potential impact that a decision in this case could have on the ability of employers to respond practically and responsibly to allegations that minorities or women may be underrepresented in their workforces. Whether or not such underrepresentation is caused by the particular employer's discrimination, it makes employers potential targets of discrimination suits filed by members of protected groups or by federal and state equal employment enforcement agencies. Such suits often are framed broadly, and the scope of the employer's potential liability may be difficult to ascertain prior to class certification hearings, discovery, trial on the merits, or post-trial remedial proceedings. Consequently, employers often face the practical necessity of exploring ways of ensuring that they are meeting their equal employment obligations and of avoiding such suits, either through settlements or consent decrees, or by voluntary affirmative action to eliminate such underrepresentation.

Employers are concerned that a decision in this case could limit unduly their flexibility in avoiding or resolving discrimination claims, particularly in light of the Court's decision in *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979). EEAC members would view with great concern any limitation on the ability of employers to adopt voluntary policies, consistent with *Weber*, which are designed to eliminate a workforce underutilization of protected group members. At the same time, it is clear from *Weber* that, absent a finding of discrimination, preferential treatment cannot be required of employers who do not wish voluntarily to adopt such policies. Accordingly, EEAC members have a direct interest in the issue involved in this case, *i.e.*, the extent to which a conspicuous workforce imbalance justifies a sex-based employment preference undertaken pursuant to a voluntary affirmative action plan.

Because of its interest in such issues, EEAC has participated in numerous other cases involving issues relat-

ing to the nature and scope of the equal employment and affirmative action obligations of employers. *E.g., Local Number 93 v. City of Cleveland,* 106 S. Ct. 3063 (1986); *Wygant v. Jackson Bd. of Educ.,* 106 S. Ct. 1842 (1986); *Firefighters Local Union No. 1784 v. Stotts,* 467 U.S. 561 (1984); *Boston Firefighters Union, Local 718 v. Boston Chapter, NAACP,* 461 U.S. 477 (1983); *Minnick v. California Department of Corrections,* 452 U.S. 105 (1981); *Fullilove v. Klutznick,* 448 U.S. 448 (1980); *United Steelworkers of America v. Weber,* 443 U.S. 193 (1979); *County of Los Angeles v. Davis,* 440 U.S. 625 (1979); *Regents of the University of California v. Bakke,* 438 U.S. 265 (1978); *International Brotherhood of Teamsters v. United States,* 431 U.S. 324 (1977).

STATEMENT OF THE CASE

This case involves a challenge brought by Paul Johnson under Title VII, 42 U.S.C. § 2000e, *et seq.*, to the selection, pursuant to an affirmative action plan, of a female for a road dispatcher position with the Transportation Agency of Santa Clara County, California (Agency). Johnson alleges that he was denied the promotion on account of his sex, in violation of Title VII.

In 1979, the Agency announced an opening for a road dispatcher, for which Johnson and eight others, including Diane D. Joyce, applied. Both Johnson and Joyce were long-time Agency employees.

Based on an oral examination conducted by a two-member board, Johnson tied for second with a score of 75, while Joyce (the only female applicant) received the third highest score of 72.5. Following a second oral board, Johnson was recommended for the dispatcher position. Joyce, however, was appointed to the position pursuant to an affirmative action plan (AAP) which had been undertaken voluntarily by the Agency. At the time of her appointment, the plan indicated that the agency had no women in 238 skilled-craft positions. Both of the

road dispatchers at the time of Joyce's appointment were men.

The AAP did not set rigid quotas for any job classification. Rather, the AAP established a goal of attaining a work force which included, in all occupations and at all levels, a composition of minorities, women and handicapped persons consistent with their representation in the area labor force. The AAP expressly stated that:

> The "goals" established for each Division should not be construed as "quotas" that must be met. The "goals["] should rather be seen as realistic desired levels of achievement . . . AAP at 21.

The AAP recognized that the mere prohibition of discriminatory practices is not enough to remedy the effects of past practices and that affirmative measures were required to achieve the goals of the plan. The plan identified job classifications, including skilled-craft jobs, where women had not been "traditionally employed" and where a "significant underrepresentation" of women existed. AAP at 12, 13.

The district court held that the failure of the Agency to promote Johnson to the dispatcher position violated Title VII. The court concluded that Johnson was better qualified and that Joyce would not have been promoted but for her sex. Appendix to Petition for Writ of Certiorari at 12a-13a ("Pet. App."). The court rejected the Agency's reliance on the AAP, stating that the Agency had not demonstrated that the plan was temporary and remedial and that the action pursuant to the plan unnecessarily trammelled Johnson's interests. *Id.* at 14a.

The court of appeals, in an opinion reported at 770 F.2d 752 (1984), reversed the lower court decision. The court of appeals concluded that the AAP was consistent with the standards for lawful voluntary affirmative action plans set forth by this Court in *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), and that the

purposes of the plan mirrored those of Title VII. The court also observed that the plan was sufficiently temporary, because it was not intended to maintain any particular male-female balance but merely was designed to eliminate a manifest imbalance in certain job classifications.

The court stated that in order to demonstrate that its plan is remedial, it is not necessary for an employer to demonstrate its own purposeful discrimination, nor is a judicial finding of discrimination required. Rather "[i]t is sufficient for the employer to show a conspicuous imbalance in its workforce." 770 F.2d at 758. The court concluded that "Joyce's sex was viewed as an additional positive factor in an otherwise qualified candidate," *id.* at 759, and that the Agency's selection of Joyce pursuant to the AAP was a lawful effort to eliminate an entrenched pattern of imbalance in certain positions in the workforce.

SUMMARY OF ARGUMENT

While it is clear that absent a finding of persistent or egregious discrimination, an employer cannot be *required* to undertake race or sex-based employment preferences, it is equally clear that Title VII *permits* employers voluntarily to engage in certain types of affirmative action without violating the Title VII rights of non-minorities or males. A flexible approach to the types of affirmative action that may be undertaken by employers is consistent with previous decisions of the Court, *see United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), and with a number of important policies underlying Title VII. Such an approach provides a means for employers to effectuate the purposes of Title VII by enabling them to increase the job opportunities available to minorities and women.

An internal analysis of an employer's workforce that reveals a conspicuous imbalance of minorities or women provides a sufficient basis for adopting a voluntary af-

firmative action plan or program. This is so, even if such a conspicuous imbalance would not be sufficient to establish a prima facie violation of Title VII.

Once an employer has demonstrated a factual predicate for adopting a voluntary affirmative action plan by uncovering some evidence of a racial or sexual imbalance in its workforce, a plan is bona fide and lawful if it (1) is designed to result in a workforce roughly representative of the area labor market; (2) is temporary and exists only so long as is necessary to achieve its goals; (3) does not result in the selection of unqualified applicants; and (4) does not bar non-minorities or males or otherwise unnecessarily trammel their interests. Neither a finding nor an admission of discrimination is required to justify an affirmative action plan, and actions taken pursuant to a bona fide affirmative action plan should be presumed to be lawful.

Regardless of its decision on the application of the particular plan to the selection decision at issue in this case, the Court should reaffirm that voluntary affirmative action, including the use of goals and timetables, is a lawful means to monitor the utilization of minorities and women in an employer's workforce. Finally, if the Court determines that a finding of a conspicuous imbalance in an employer's workforce is insufficient to support the adoption and implementation of an affirmative action plan, the Court should apply the decision prospectively only.

ARGUMENT

I. VOLUNTARY, FLEXIBLE AFFIRMATIVE ACTION IS CONSISTENT WITH IMPORTANT POLICIES UNDERLYING TITLE VII AND WITH PRIOR DECISIONS OF THIS COURT.

In this case, the Court is called upon to determine the extent to which employers may undertake voluntary affirmative action designed to eliminate conspicuous racial or sexual imbalances which may exist in their workforces. While it is clear that, absent a finding of persistent or egregious discrimination, an employer cannot be *required* to undertake race or sex-based employment preferences, *Local 28 of Sheet Metal Workers v. EEOC*, 106 S. Ct. 3019, 3034, 3054 (1986), it is equally clear that Title VII *permits* employers voluntarily to engage in certain types of affirmative action without violating the Title VII rights of non-minorities or males who may be affected by such actions. As set forth below, it is submitted that a flexible approach to the types of affirmative action that may be undertaken by employers is consistent with previous decisions of this Court and with a number of important policies underlying Title VII.

In *United Steelworkers of America v. Weber*, 443 U.S. 193, 208-09 (1979), this Court held that Title VII does not prohibit private, voluntary race-conscious affirmative action efforts that are designed to eliminate a conspicuous imbalance in an employer's workforce, are temporary in nature and do not unnecessarily trammel the interests of non-minority employees. In *Weber*, the court read the legislative history underlying Title VII to indicate clearly that "management prerogatives . . . be left undisturbed to the greatest extent possible," *id.* at 206, and that "Congress did not intend to limit traditional business freedom," *id.* at 207, so as to prohibit voluntary affirmative action plans. Following this Court's decision in *Weber*, a substantial number of employers, both private

and public, have undertaken various forms of voluntary affirmative action, either through formal plans or by other means.

A flexible approach to the forms of affirmative action permitted by *Weber* and by Title VII serves a number of important purposes that are consistent with the objectives underlying Title VII. First, such voluntary plans or programs are consistent with the notion, long recognized by the courts, that voluntary compliance is the preferred means of eliminating employment discrimination. *See, e.g., Local Number 93 v. City of Cleveland*, 106 S. Ct. 3063, 3072 (1986); *W. R. Grace and Company v. Local Union 759*, 461 U.S. 757, 770-71 (1983); *Ford Motor Company v. EEOC*, 458 U.S. 219, 228 (1982); *Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n. 14 (1981); *Alexander v. Gardner-Denver Company*, 415 U.S. 36, 44 (1974).

Second, as this Court noted in *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971), Title VII was enacted to "achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." Consistent with this policy, voluntary affirmative action plans provide a means for employers to "self examine and self-evaluate their employment practices and to eliminate, so far as possible, the last vestiges of their discriminatory practices." *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 364 (1977), *quoting Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975).

A third practical advantage of a flexible approach to the types of affirmative action allowed by *Weber* is that it has enabled employers, if they choose, to respond practically and responsibly to concerns that minorities and women may be underrepresented in their workforces.

This ability to respond voluntarily to such underrepresentation is important because, as this Court recognized in *Teamsters*, 431 U.S. at 339 n. 20, there is an expectation under Title VII that absent explanation, nondiscriminatory employment practices will in time result in a workforce more or less representative of the area from which the employer draws its applicants. In addition, in *Hazelwood School District v. United States*, 433 U.S. 299, 307-08 (1977), the Court held that gross statistical disparities alone may constitute prima facie proof of discrimination.

Whether or not such underrepresentation may have been caused by an employer's own discrimination, it makes employers potential targets of persons protected by Title VII (and other state and federal equal employment statutes and regulations), and of federal and state equal employment enforcement agencies. Thus, employers often may be faced with the practical need to attempt to avoid or lessen the likelihood of such suits through the adoption and implementation of voluntary affirmative action plans.

The dilemma faced by employers in attempting to take affirmative steps to assure equal employment opportunity without unnecessarily interfering with the employment rights and opportunities of non-minority employees has been recognized by a number of courts. This dilemma was addressed by Judge Wisdom in his dissenting opinion in the Fifth Circuit decision in *Weber v. Kaiser Aluminum & Chemical Corp.*, 563 F.2d 216, 230 (5th Cir. 1978), where he stated that:

> The employer and the union are made to walk a high tightrope without a net beneath them. On one side lies the possibility of liability to minorities in private actions, federal pattern and practice suits, and sanctions under Executive Order 11246. On the other side is the threat of private suits by white employees

> and potentially, federal action. If the privately imposed remedy is either excessive or inadequate, the defendants are liable. Their good faith in attempting to comply with the law will not save them from liability, including liability for back pay (citation omitted).

Justice Blackmun, in his concurring opinion in *Weber, supra*, 443 U.S. at 210, similarly recognized the predicament which employers and unions face:

> If Title VII is read literally, on the one hand they face liability for past discrimination against blacks, and on the other they face liability to whites for any voluntary preferences adopted to mitigate the effects of prior discrimination against blacks.

See also Wygant v. Jackson Bd. of Educ., 106 S.Ct. 1842, 1855 (1986) (O'Connor, J., concurring); *Bratton v. City of Detroit*, 704 F.2d 878, 884 n. 18, *vacated and remanded*, 712 F.2d 222 (6th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984); *Setser v. Novack Inv. Co.*, 657 F.2d 962, 967-68 (8th Cir.) (*en banc*), *cert. denied*, 454 U.S. 1064 (1981); *Valentine v. Smith*, 654 F.2d 503, 509-10 (8th Cir. 1981).

Thus, a flexible reading of *Weber* has served as a way for employers to avoid "walking a high tightrope without a net beneath them." It has provided a means not only for employers to limit their own liability, but also to effectuate the purposes of Title VII and other federal and state non-discrimination laws, orders and regulations by enabling them to increase the job opportunities available to minorities and women. As set forth below, it is submitted that this Court should maintain, as most of the lower courts have, a flexible standard under *Weber* that permits employers to take meaningful affirmative measures to eliminate conspicuous racial or sexual imbalances in their workforces.

II. AN INTERNAL INVESTIGATION AND CONCLUSION THAT A CONSPICUOUS IMBALANCE EXISTS IS A SUFFICIENT BASIS TO JUSTIFY AN AFFIRMATIVE ACTION PLAN.

The court of appeals in this case determined that in order for an employer to show that its affirmative action plan was remedial, it is not necessary for the employer to demonstrate its own history of discrimination. 770 F.2d at 758. Rather, the court held that "it is sufficient for the employer to show a conspicuous imbalance in its work force." *Id.* As set forth below, it is submitted that the standard thus adopted by the lower court—whether a conspicuous racial or sexual imbalance exists—is consistent with *Weber* and should be affirmed by this Court.

In *Weber*, 443 U.S. at 209, this Court approved a voluntary affirmative action plan which was "designed to eliminate conspicuous racial imbalance in traditionally segregated job categories". It is submitted that the "conspicuous racial [or sexual] imbalance"[2] standard employed in *Weber* is consistent with the purposes, discussed below, underlying Title VII and with the better-reasoned lower court decisions interpreting *Weber* and should be reaffirmed by this Court.

The lower courts have developed standards for evaluating the lawfulness of voluntary affirmative action plans that provide sufficient flexibility to enable employers to take steps to eliminate possible past discrimination in a

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[2] Although *Weber* involved a plan designed to eliminate conspicuous *racial* imbalances in craft jobs, there is no reason to conclude that Congress intended any different standard to apply where an affirmative action plan is implemented to eliminate similar *sexual* imbalances. *See La Riviere v. EEOC*, 682 F.2d 1275, 1279 (9th Cir. 1982) ("Congress did not intend, when it added to Title VII the prohibition of gender-based employment discrimination, to prohibit voluntary affirmative action programs designed to correct long-standing sexual imbalances in the workforce").

manner that is consistent with the principles laid down by the Court in *Weber*. As set forth below, it is submitted that principles derived from these cases provide a framework that this Court should draw upon in deciding the instant case.

For example, in *Setser*, 657 F.2d at 968, the Eighth Circuit established a standard for determining whether an employer had a sufficient basis or factual predicate for adopting an affirmative action plan or program. The court stated that to justify the adoption of such a program, the employer has the burden of producing "some evidence that its affirmative action program was a response to a conspicuous racial imbalance in its work force and is remedial." *Id. See also Warsocki v. City of Omaha*, 726 F.2d 1358, 1360 (8th Cir. 1984).

The court in *Setser*, 657 F.2d at 968, also declared that "[a] showing of a conspicuous racial imbalance by statistics is sufficient, even if the statistics employed would not be sufficient to show a prima facie violation of title VII." Other lower courts likewise have held that a demonstration of a prima facie case is not a prerequisite to the adoption of a voluntary affirmative action plan. *See, e.g., Bushey v. N.Y. St. Civ. Serv. Com'n*, 733 F.2d 220, 226 n.7 (2d Cir. 1984), *cert. denied*, 105 S. Ct. 803 (1985); *Detroit Police Officers' Ass'n. v. Young*, 608 F.2d 671, 689 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981). This also is consistent with Justice Brennan's opinion in *Weber*, 443 U.S. at 208 n.8, which noted that "[t]his is not to suggest that the freedom of an employer to undertake race-conscious affirmative action efforts depends on whether or not his effort is motivated by fear of liability under Title VII."

While an identified "conspicuous racial imbalance" may, in certain cases, be sufficient to establish a prima

facie violation of Title VII, the necessity for demonstrating a prima facie case before an affirmative action plan may be implemented should not be an express part of any standard adopted by this Court. As the EEOC Affirmative Action Guidelines recognize, "voluntary affirmative action cannot be measured by the standard of whether it would have been required had there been litigation, for this standard would undermine the legislative purpose of first encouraging voluntary action without litigation". 29 C.F.R. § 1608.1(c); *see also* 29 C.F.R. § 1608.4(b) ("It is not necessary that the self analysis establish a violation of Title VII).

Finally, and perhaps most importantly, the court in *Setser*, 657 F.2d at 968, observed that an "employer's internal investigation and analysis of its work force which results in a conclusion of a racially imbalanced work force would satisfy the employer's burden". *Id.*[3] The ability to base an affirmative action plan on such a self analysis also is consistent with the suggestions contained in the EEOC Affirmative Action Guidelines. *See* 29 C.F.R. § 1608.4(a).

Thus, it is submitted that the Court should hold expressly that an internal analysis of an employer's work-

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[3] *In Janowiak v. Corporate City of South Bend*, 750 F.2d 557, 562 (7th Cir. 1984), *petition for cert. filed*, 53 U.S.L.W. 3896 (U.S. June 10, 1985), the Seventh Circuit stated that a finding of a statistical disparity between the percentage of minorities employed and the percentage of minorities within the community was not sufficient to justify the adoption of an affirmative action plan. The Seventh Circuit's standard would appear to be seriously at odds with this Court's decision in *Hazelwood*, 433 U.S. at 307-08, where the Court held that gross statistical disparities alone may constitute prima facie proof of discrimination, which if unrebutted would entitle the plaintiff to the entry of judgment in its favor. While evidence other than conspicuous statistical disparities often may be present when an employer is considering whether to adopt an affirmative action plan, a specific requirement for such additional evidence should not be adopted by this Court.

force that reveals a conspicuous imbalance of minorities or women provides a sufficient basis for adopting a voluntary affirmative action plan or program.

III. AN AFFIRMATIVE ACTION PLAN IS LAWFUL IF IT IS DESIGNED TO ACHIEVE A WORKFORCE ROUGHLY REPRESENTATIVE OF THE LABOR MARKET, IS TEMPORARY, DOES NOT RESULT IN HIRING UNQUALIFIED APPLICANTS, AND DOES NOT BAR NON-MINORITIES OR MALES OR OTHERWISE UNNECESSARILY TRAMMEL THEIR INTERESTS.

Once an employer has established a factual predicate for the adoption of a plan by uncovering some evidence of a conspicuous racial or sexual imbalance in its workforce, the plan itself is bona fide and lawful if it is shown that (1) it is designed to result in an employer's workforce that is roughly representative of the area labor market; (2) the plan is temporary and exists only so long as is reasonably necessary to achieve its legitimate goals; (3) the plan does not result in the selection of unqualified applicants; and (4) the plan does not bar non-minorities or males or otherwise unnecessarily or invidiously trammel their interests. As discussed below, these standards provide a reasonable means to judge the lawfulness of voluntary affirmative action plans that is consistent with a goal of increasing the employment opportunities of minorities and women while ensuring that the interests of non-minorities and males are not unnecessarily interfered with.

A. A Plan That Is Designed To Achieve A Workforce Roughly Representative Of The Relevant Labor Market Is Not Unlawful.

The first prong identified above—that a plan should be designed to achieve a workforce roughly representative of the area labor market—is consistent with decisions of this Court and the lower courts and with interpretations by

the federal enforcement agencies. As the Sixth Circuit correctly noted in *Detroit Police Officers' Ass'n v. Young*, 608 F.2d at 696, "a goal which seeks the same racial proportion among employees as in the labor force will ordinarily be reasonable".

This standard also is consistent with the recognition by this Court that "absent explanation, it is ordinarily to be expected that non-discriminatory hiring practices will in time result in a workforce more or less representative of the racial and ethnic composition of the population in the community from which employees are hired". *Teamsters*, 431 U.S. at 340 n. 20; *see also Weber*, 443 U.S. at 208-09 (approving a plan where preferential selection would end when the percentage of black skilled craft workers approximated the percentage of blacks in the local labor force); *Policy Statement on Affirmative Action*, 41 Fed. Reg. 38,815 (1976) ("The first step in the construction of any affirmative action plan should be an analysis of the employer's workforce to determine whether percentages of sex, race, or ethnic groups in individual job classifications are substantially similar to the percentages of those groups available in the relevant job market who possess the basic job-related qualifications"); EEOC *Affirmative Action Guidelines*, 29 C.F.R. § 1608.3 (b) ("The effects of prior discriminatory practices can be initially identified by a comparison between the employer's work force, or a part thereof, and an appropriate segment of the labor force").

B. The Plan Must Be Temporary.

This requirement is derived directly from *Weber*, where the Court noted that "the plan is a temporary measure; it is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance". 443 U.S. at 208. The court of appeals in this case correctly read *Weber* "to require that a plan be temporary in the sense that it must end when its goals of parity are met". 748 F.2d at 1312.

C. The Plan Should Not Result In The Selection Of Unqualified Persons

Numerous courts have recognized that it is not unlawful to use race or sex as a factor in selecting from among qualified candidates pursuant to a bona fide affirmative action plan. *See, e.g., Johnson*, 770 F.2d at 759; *Kirkland v. N.Y. State Department of Correctional Services*, 711 F.2d 1117, 1133 (2d Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984); *Setser*, 657 F.2d at 969; *Valentine*, 654 F.2d at 511; *Parker v. Baltimore & O.R. Co.*, 41 FEP Cases 761, 766 (D.D.C. 1986) ("As long as the chosen candidates satisfied the minimum requirements—as these candidates did—it was not discriminatory for B&O to transfer them ahead of plaintiff as part of its affirmative action efforts").

This case comes before the Court in an unusual posture, in that the oral boards which interviewed and rated Johnson and Joyce found Johnson to be the better qualified. More typical, particularly in the private sector, are situations where relative, objective merit determinations are not easily arrived at. Because of the rigidity of the present federal guidelines on showing the validity or job-relatedness of employment tests, *see Uniform Guidelines on Employee Selection Procedures*, 29 C.F.R. § 1607; Potter, *Employee Selection: Legal And Practical Alternatives To Compliance and Litigation*, 2d Ed. (National Foundation For The Study Of Equal Employment Policy, 1986), merit testing simply is not practicable for many employers in a great many situations.

The practical reality of employee selection where merit testing does not exist is that selections frequently are the product of informed, but often subjective, choices from among a number of qualified persons who possess different skills and characteristics that may be of value to the employer. Thus, unless a minority or woman selected pursuant to a bona fide affirmative action plan is clearly unqualified or demonstrably less qualified, the Court simply

should not put private employers in the position of having their employment decisions second-guessed. *See Weber*, 443 U.S. at 207 (Title VII not intended to "diminish traditional management prerogatives" or "to limit traditional business freedom"). *Cf. California Brewers Association v. Bryant*, 444 U.S. 598, 608 (1980).

D. The Plan Should Not Bar Non-Minorities Or Males Or Otherwise Unnecessarily Trammel Their Interests.

The lower court in this case correctly noted that where there is only a single selection in issue, it cannot be said that the selection of a minority or woman pursuant to an affirmative action plan "serves as a bar or unnecessarily trammels the interests of other employees". 770 F.2d at 759; *see also Talbert v. City of Richmond*, 648 F.2d 925, 929 (4th Cir. 1981), *cert. denied*, 454 U.S. 1145 (1982). Any other rule would have the effect of subjecting each decision made pursuant to an affirmative action plan to a potential "reverse discrimination" claim. Such a result could have a significant effect on the willingness of employers to undertake voluntary affirmative action programs.

E. Actions Taken Pursuant To A Bona Fide Affirmative Action Plan Should Be Presumed To Be Lawful.

Once an employer has identified a "conspicuous [racial or sexual] imbalance" in its workforce and has adopted a bona fide affirmative action plan or program consistent with the guidelines set forth above, decisions made pursuant to such a plan should be presumed to be lawful. In order to avoid having judgment entered against him or her as a matter of law, a plaintiff in a "reverse discrimination" case should be required to show that:

(1) some reason other than a remedial reason motivated the employer when implementing the plan or

(2) the plan adopted unreasonably exceeds its remedial purpose. *Setser*, 657 F.2d at 969.[4]

Absent such a showing, an employer faced with a challenge to the operation of a voluntary, bona fide affirmative action plan should be entitled to judgment as a matter of law.

F. Neither A Finding Nor An Admission Of Discrimination Is Required To Justify An Affirmative Action Plan.

The lower court in this case correctly noted that a judicial determination of discrimination is not required before an employer, either public or private, can adopt an affirmative action plan. *Johnson*, 770 F.2d at 758. *See also Bushey*, 733 F.2d at 228 n.11 ("[A] judicial determination of racial discrimination is not a prerequisite to an employer adopting voluntary, race-conscious remedies to comply with Title VII"). A requirement for a judicial finding of discrimination as a predicate to the approval of a bona fide affirmative action program would place an additional unnecessary strain on our already overburdened judicial system and, as noted below, such a finding could potentially be used against the employer in subsequent actions.

Neither should an employer be required to admit, either explicitly or implicitly, that it has engaged in prior discrimination. Any requirement that an employer admit a violation of the law before it could adopt a voluntary affirmative action plan or program would undermine significantly the ability and willingness of employers to undertake such programs. *See Wygant*, 106 S. Ct. at 1855

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[4] For example, a plaintiff in a reverse discrimination case could attempt to show that "the defendant is that unusual employer who discriminates against the majority", *Parker v. Baltimore & O.R.* 652 F.2d 1012, 1017 (D.C. Cir. 1981), or that the affirmative action program was designed to maintain a particular racial or sexual balance rather than merely to eliminate a conspicuous imbalance.

(O'Connor, J., concurring). The risk that such admissions would be used by other employees or groups of employees in future lawsuits as evidence of the employer's unlawful discrimination would deter many employers from undertaking voluntary affirmative action. Thus, it is submitted that where the requisite showing of a conspicuous imbalance in the workforce has been made, a sufficient predicate for affirmative action exists without the need to go further and require a finding or admission that the imbalance resulted from discrimination.[5]

IV. EVEN IF THE COURT DETERMINES THAT JOHNSON WAS UNLAWFULLY DISCRIMINATED AGAINST, IT SHOULD CLEARLY REAFFIRM THAT LEGITIMATE, VOLUNTARY AFFIRMATIVE ACTION PLANS ARE PERMITTED UNDER TITLE VII.

As noted above, in this case Johnson contends that he was discriminated against when he was denied a promotion pursuant to the *application* of a voluntary affirmative action plan. Pursuant to the criteria suggested above, it would appear that the affirmative action *plan itself* would not be subject to challenge as violative of Title VII. Regardless of its holding on the lawfulness of the application of the plan in this particular instance, the Court should reaffirm that voluntary affirmative action plans themselves are a lawful means to monitor the utilization of minority, female and handicapped individuals in an employer's workforce.

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[5] This is consistent with EEOC's *Affirmative Action Guidelines*, 29 C.F.R. § 1608. 4(b), which provide that:

> It is not necessary that the [employer's] self analysis establish a violation of Title VII. This reasonable basis [for concluding that affirmative action is needed] exists without any admission or formal finding that the person has violated Title VII, and without regard to whether there exists arguable defenses to a Title VII action.

Where individuals challenge the application of an affirmative action plan to a particular selection decision, such a challenge should not call into question the lawfulness of the affirmative action plan itself. Rather, this Court should clearly note that the affirmative action *plan itself* was not unlawful, and that the provisions contained in the plan for recruitment, selection, upward mobility, training and the monitoring of the utilization of minority, female and handicapped individuals can stand regardless of the outcome of Johnson's individual challenge. This is particularly true where, as here, the plan contained no fixed quotas or other rigid requirements that a particular percentage of selections must be from any particular race or sex.

The Court also should clearly indicate that private employers are free under Title VII to adopt race or sex-conscious *goals* which serve as a means of measuring good-faith efforts to increase the employment opportunities of minorities and women. A recognition that flexible goals are permissible under Title VII is consistent with long-standing agency interpretations and with decisions of this Court and the lower courts.

Beginning in 1969, the agencies charged with the enforcement of equal employment opportunity laws, orders and regulations have distinguished flexible "goals" from rigid quotas. *See, e.g.*, 42 Op. Atty. Gen. 405 (1969); *Memorandum—Permissible Goals and Timetables In State and Local Government Employment Practices*, 2 Empl. Prac. Guide (CCH) 3775 (March 23, 1973), issued by EEOC, the Departments of Justice and Labor and the Office of Federal Contract Compliance ("All of the agencies recognize that goals and timetables are appropriate as a device to help measure progress in remedying discrimination"; "All agencies recognize the basic distinctions between permissible goals on the one hand and impermissible quotas on the other"; "A goal . . . is a numerical objective, fixed realistically in terms of the number of vacancies expected, and the number of qualified

applicants available in the relevant job market". *Id.* at 2096); *Policy Statement on Affirmative Action*, 41 Fed. Reg. 38,815 (1976).

In addition, Executive Order 11246 and its supporting affirmative action regulations issued by OFCCP require federal contractors to undertake a written workforce analysis and develop a written affirmative action compliance program for each of their establishments.[6] If a contractor's "utilization" of available minorities or women is numerically deficient, it must develop "goals and timetables" to overcome the deficiency in any particular job group.[7] *See also OFCCP v. Priester Construction Co.*, No. 78-OFCCP-11 (Feb. 22, 1983), summarized in OFCCP Order No. 970 a3, reprinted in 2 BNA AACM D: 9121 (1983) (Distinguishing "goals" from rigid "quotas").

Flexible goals properly have been viewed as "benchmarks" against which employers, the federal enforcement agencies and the courts can measure an employer's efforts to ensure that it is affording equal employment opportunities to all, particularly those groups which may have been affected by any past practices that operated to interfere with their employment opportunities. *See Local 28*, 106 S. Ct. at 3051 (Opinion of Justice Brennan) (Goal approved which serves "as a benchmark against which the court could gauge petitioner's efforts to remedy past discrimination"); 106 S. Ct. at 3060 (Concurring and dissenting opinion of Justice O'Connor) ["A] racial hiring or membership goal must be intended to serve merely as a benchmark for measuring compliance with Title VII and eliminating the lingering effects of past discrimination, rather than a rigid numerical requirement that must unconditionally be met on pain of sanction.").[8]

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[6] Revised Order No. 4, 41 C.F.R. Part 60-2.

[7] 41 C.F.R. §§ 60-2.10, 60-2.12.

[8] At the request of both EEOC and the Department of Justice, a number of lower courts have ordered relief that included the use

Thus, the Court should clearly acknowledge that flexible affirmative action plans which are designed as a means to gauge an employer's efforts to ensure equal employment opportunity and to increase the number of minorities and women in its workforce are permissible under Title VII.

V. IF THE COURT DETERMINES THAT FINDINGS OF A CONSPICUOUS IMBALANCE ARE INSUFFICIENT TO SUPPORT THE ADOPTION AND IMPLEMENTATION OF AN AFFIRMATIVE ACTION PLAN, THE COURT SHOULD APPLY THE DECISION PROSPECTIVELY ONLY.

Although it upheld the plan before it in *Weber*, this Court expressly noted that "[w]e need not today define in detail the line of demarcation between permissible and impermissible affirmative action plans." 443 U.S. at 208. In its recent decision in *Local Number 93*, 106 S.Ct. at 3073 n.8, the Court expressly left unanswered a number of important questions regarding the proper scope of voluntary affirmative action, including "what showing the employer would be required to make concerning possible prior discrimination on its part against minorities in order to defeat a challenge by nonminority employees based on § 703." *See also* 106 S.Ct. at 3080 (O'Connor, J., concurring). The Court thus has given no clear signal that employers should not rely on the body of lower court decisions (discussed *supra*) upholding voluntary affirmative action plans predicated on conspicuous workforce imbalances.

Meanwhile, as noted above, the federal enforcement agencies and the lower courts have actively encouraged

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of goals and timetables for employing minorities and women. *See, e.g., United States v. City of Alexandria*, 614 F.2d 1358 (5th Cir. 1980); *United States v. Lee Way Motor Freight, Inc.*, 625 F.2d 918 (10th Cir. 1979); *EEOC v. American Tel. & Tel. Co.*, 556 F.2d 167 (3d Cir. 1977), *cert. denied*, 438 U.S. 915 (1978).

and in many instances insisted upon the use of goals and timetables as a means of measuring employers' progress in increasing the number of minorities and women in the workforce. Against this background, and in part because of these government pressures, countless employers throughout the nation have adopted affirmative action plans designed to alleviate conspicuous workforce imbalances.

Under these circumstances, should the Court now determine that a finding of a conspicuous racial or sexual imbalance is *not* a sufficient basis for adopting and implementing a voluntary affirmative action plan, it would be inappropriate to impose retroactive liability on employers who have adopted such plans. Rather, any relief to "reverse discrimination" claimants affected by the operation of such plans should be prospective only.

In *Albemarle Paper Co. v. Moody*, 442 U.S. 405, 421 (1975), this Court held that backpay may be denied when the denial would not frustrate the central purpose of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination. The Court in *Albemarle* also held that backpay was not to be awarded automatically in every case. *Id.* at 424. In *City of Los Angeles v. Manhart*, 435 U.S. 702 (1978), this Court, in denying a retroactive backpay award in a pension contribution case, relied upon the fact that "the administrative agencies had conflicting views," *id.* at 720 and n.37; that the City reasonably could have thought it illegal to make male employees shoulder more than their "actuarial share" of the pension burden, *id.*, and that the legal theory upheld "represent[ed] a marked departure from past practice." *Id.* at 722; *see also Arizona Governing Committee, Etc. v. Norris*, 463 U.S. 1073, 1094-95, 1109-11 (1983). These reasons fully support the denial of backpay to "reverse

discriminatees" where employers in good faith have adopted affirmative action plans which at the time they were adopted were supportable by existing case law or government enforcement agency policy or which otherwise were designed to eliminate the underrepresentation of protected groups in their workforces.[9]

A decision by this Court allowing imposition of retrospective monetary liability against employers who merely sought, in good faith, to carry out voluntary affirmative action efforts consistent with federal laws and policies would clearly be unjust. Thus, if the Court determines that a finding of a conspicuous imbalance is insufficient to establish a basis for voluntary affirmative action, the Court should clearly state that relief to "reverse discriminatees" should be prospective only. Such a rule will give well-intentioned employers who have relied on agency interpretations and court rulings an opportunity to modify their plans to comply with the Court's decision before they are subject to liability.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Court should hold that a conspicuous racial or sexual imbalance provides a sufficient basis for adopting and implementing a voluntary affirmative action plan. In addition, the Court should hold that an affirmative action plan is lawful if it is designed to achieve a workforce roughly representative of the area labor market, is

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[9] The denial of backpay to individuals alleged to be adversely affected by the operation of an affirmative action plan is consistent with the EEOC *Affirmative Action Guidelines*, 29 C.F.R. § 1608.1, 1608.2. The Guidelines state that an employer who adopts and implements an affirmative action plan in accordance with the Guidelines can invoke the protections of 42 U.S.C. § 2000e-12(b)(1) of Title VII, which prohibits liability against an employer whose actions were taken "in good faith, in conformity with, and in reliance upon a written interpretation or opinion of the Commission."

temporary, does not result in selection of unqualified persons and does not bar non-minorities or males or otherwise unnecessarily trammel their interests.

Respectfully submitted,

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No. 85-1129

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

PAUL E. JOHNSON,

Petitioner

v.

TRANSPORTATION AGENCY, SANTA CLARA COUNTY, CALIFORNIA, and SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 715,

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, AND THE PORTO RICAN LEGAL DEFENSE AND EDUCATION FUND, INC. AS AMICI CURIAE SUPPORTING RESPONDENTS

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INTEREST OF THE AMICUS CURIAE

The Lawyers' Committee for Civil Rights Under Law was organized in 1963, at the request of the President of the United States, to involve private attorneys in the national effort to assure the civil rights of all Americans. During the past 23 years, the Lawyers' Committee and its local affiliates have enlisted the services of thousands of members of the private bar in addressing the legal problems of victims of discrimination in all forms.

The Mexican American Legal Defense and Educational Fund ("MALDEF") is a national civil rights organization established in 1967. Its principal objective is to secure, through litigation and education, the civil rights of Hispanics living in the United States. In this context, MALDEF has advocated the adoption of voluntary affirmative action plans that permit employers to consider race, national origin and gender as affirmative factors when making employment decisions. Such plans provide an important remedy against entrenched employment discrimination, thus providing groups which have been historically discriminated against and thus underrepresented in specific job classifications an opportunity to participate fully in the American economic system. The modest gains achieved under such plans are of particular importance to Hispanic women, who encounter the double burden of discrimination based on national origin/race and sex.

The National Association for the Advancement of Colored People is a non-profit corporation. Its principal objectives include promoting equality of rights, eradicating prejudice among the citizens of the United States and securing for them increased employment opportunities according to their abilities.

The Porto Rican Legal Defense and Education Fund, Inc. is a national organization dedicated to protecting and furthering the rights of Porto Ricans and other Hispanics

All of the amici support affirmative action plans as vital remedies for unlawful discrimination. They believe that a ruling striking down the plan used in this case would eviscerate voluntary employer efforts to eradicate that discrimination.

STATEMENT OF THE CASE

Petitioner, Paul E. Johnson, who did not receive a desired promotion, sued his employer, Respondent Transportation Agency, Santa Clara County, California (the "Agency") in the United States District Court for the Northern District of California. Petitioner alleged that the Agency discriminated against him on account of his sex in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et. seq*. (1982), by promoting a qualified female employee, Diane Joyce, in his stead. In promoting Joyce as one of seven employees certified as "qualified" for the position of road dispatcher, the Agency considered her gender as an additional positive factor in the promotion.

At the time of Joyce's promotion, the skilled craft job category comprising the road dispatcher position contained 238 employees, all of whom were men. As stated in the Agency's Equal Employment Opportunity Affirmative Action Plan of December 18, 1978 (the "1978 Plan"), "women in . . . skilled craft job classifications . . . have traditionally been greatly underrepresented." Joint Appendix ("J.A.") 58. Road dispatchers maintain records and assign crews, equipment, and materials to road maintenance jobs in the County. J.A. 23-24.

In addition to the overwhelming statistical proof, the record reflects evidence of discriminatory attitudes and conduct on the part of Agency supervisory employees. As the Agency's Director testified, it has been an Agency "dominated by males, mostly white males." Transcript at 66. The Director also testified that various complaints had been filed with the Agency, as well as state or federal equal opportunity agencies, charging the Agency with sex discrimination. *Id*. at 42-44. The Director's responses to this line of questioning, however, demonstrate his hesitancy in admitting any specific instances of prior discrimination and highlight the practical impossibility of expecting employers to make such admissions, even when attempting to justify their own remedial conduct. In addition, an employee from the Agency's personnel department testified that her office had received complaints of sex discrimination.

For example, a female traffic painter had been routinely excluded from training opportunities given men in her job classification, making her ineligible for promotion opportunities. *Id.* at 231, 252. The personnel officer also testified that the Agency had routinely refused to hire pregnant women in its transit district. *Id.* at 256.

Diane Joyce herself suffered from discriminatory attitudes and behavior. When she first interviewed with the Agency, two interviewers told her individually that they preferred to hire a man. *Id.* at 110-11. Other possibly discriminatory instances included the Agency's refusal to issue Joyce a pair of coveralls to preserve her clothing during County maintenance and painting jobs, while routinely issuing coveralls to men. *Id.* at 89-90.

The record also reflects that sexual stereotypes may have influenced some members of the oral board that interviewed the road dispatcher candidates. For example, James Baldanzi, a road superintendent who participated in one interview of all the candidates, testified that he considered Diane Joyce, "not a lady," but, rather, "a rebel rousing, skirt-wearing person." *Id.* at 153, 161.

Joyce and Petitioner each met the minimum qualifications for the position of road dispatcher, having had at least four years of previous dispatch experience or four years of road maintenance experience with the County. Appendix to Petition for Writ of Certiorari ("Pet. App.") 18a.

In 1980, Joyce, Petitioner, and eight other employees applied for a recently vacant position of road dispatcher. An oral board gave Joyce the third highest score, 73, on an examination, while Petitioner tied for second with a score of 75. A second, departmental oral board recommended Petitioner for the position. Acting pursuant to the Agency's voluntary 1978 Plan and the Agency's Civil Service Rules giving him discretion to appoint any candidates who appeared on a "qualified" list, the Agency Director chose Joyce for the position. Pet. App. 4a.

The 1978 Plan provided that "mere prohibition of discriminatory practices is not enough to remedy the effects of past practices and to permit attainment of an equitable representation of . . . women . . . ." J.A. 31. Also noting that the plan "should

result in improved personnel practices that will benefit all Agency employees who may have been subjected to discriminatory personnel practices in the past," the stated goal of the plan was "to attain an Agency work force whose composition reflects the ethnic and sexual make-up of the area work force." J.A. 34.

The district court ruled for Petitioner. The court stated that its conclusion "does not constitute a square holding that the Affirmative Action Palns [sic] in issue are impermissable [sic] under Title VII . . . requirements" and that its holding was "only that defendant did not sustain its burden of proof in that regard." Pet. App. 8a. The gist of the district court's opinion is that the Agency failed to carry its purported burden of proving that its 1978 Plan and later plans were merely temporary measures under *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979). Pet. App. 14a.

The United States Court of Appeals for the Ninth Circuit reversed, holding that the purposes of the Agency's plan mirror those of Title VII, and that the promotion of Joyce pursuant to the plan satisfied the requirements set forth by this Court in *Weber*. Pet. App. 23a, 29a. Noting that "[w]hen Joyce was promoted to road dispatcher, the Agency's 237 other skilled craft positions were all held by men," the court of appeals explained that:

> Like the *Weber* plan, the Agency affirmative action plan is a remedial effort intended to break down entrenched patterns of discrimination. The Agency plan contains extensive statistics illustrating the underrepresentation of women, minorities, and the handicapped in various Agency job categories. The plan acknowledges "entrenched patterns in hiring and promotion" and recognizes the particular difficulty of achieving parity in upper-level positions when discriminated groups have been traditionally excluded from the trainee-level jobs.

Pet. App. 26a.

The court of appeals also held that an employer need not show its own history of purposeful discrimination to demonstrate

that its plan is remedial. *Id*. Despite this holding, the court found that, "were a showing of arguable violation required, we suggest that two hundred and thirty eight to zero suffices to show that too (were Ms. Joyce the plaintiff here, the job having gone to Mr. Johnson, the statistics would make out a prima facie case of discrimination)." *Id*. at 49a n.5.

Finally, the court of appeals held that the Agency plan also satisfied the requirements of *Weber* in that it was temporary and it did not create an absolute bar to the advancement of other employees or unnecessarily trammel the interests of other employees. *Id*. at 27a-29a. Recognizing that the promotion of one individual rather than another for a single job opening cannot fairly be deemed an "absolute bar" to the advancement of a whole class of employees, the court of appeals thus concluded that "the Agency's selection of Joyce, pursuant to the plan, was a lawful effort to remedy an entrenched pattern of manifest imbalance." *Id*. at 29a.

SUMMARY OF ARGUMENT

This case is of importance because it represents an effort by Petitioner and the Department of Justice to undermine last Term's decisions permitting narrowly-drawn voluntary affirmative action plans to correct the effects of past discrimination. If the existence of an all-male 238-person job classification does not justify the affirmative action plan here, it is hard to imagine how any voluntary affirmative action plan could be upheld.

Public employers are statutorily and constitutionally obligated to eliminate every vestige of gender segregation and discrimination in the workplace. *Cf*. *Wygant v. Jackson Board of Education*, 106 S. Ct. 1842, 1848 (1986) (plurality opinion). "Pursuant to that goal, [gender]-conscious remedial action may be necessary." *Id*. In a series of cases beginning with *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), this Court has continuously held that affirmative remedial measures that do not unnecessarily trammel the rights of nonminorities are consistent with the letter and spirit of Title VII.

In this case, a public employer faced a workplace that had conspicuous discriminatory patterns of employment. Engaging in the kind of self analysis recommended by the Equal Employment Opportunity Commission, the Agency concluded that merely prohibiting discriminatory practices would be insufficient to "remedy the effects of past practices and to permit attainment of an equitable representation" of women in the workplace. Equal Employment Opportunity Commission, Affirmative Action Appropriate Under Title VII of the Civil Rights Act of 1964, As Amended, 29 C.F.R. § 1608.4 (1985); J.A. 31.

An employer's voluntary gender-conscious promotion policy is presumptively valid under Title VII when the employer has a firm basis for concluding that remedial action is appropriate. The Agency had an overwhelming basis for concluding that its affirmative action plan was appropriate in this case. The record demonstrates that women have suffered and complained of discriminatory treatment, particularly in the Agency's numerous traditionally male job categories. Statistics also confirm the conclusion that the Agency has discriminated against women. For example, before Joyce's promotion, the traditionally male skilled craft job category contained not one woman. Joyce, the first woman promoted to that category, was an experienced employee deemed "qualified" after a fair examination process. In promoting Joyce, the Agency legally considered her gender as an additional positive factor that she possessed.

An employer is not required to admit or prove that it has discriminated in the past in order to institute or apply an affirmative action plan. Requiring employers to admit that they have engaged in past illegal discrimination would frustrate the remedial purposes of Title VII. The Court has consistently emphasized that Title VII contemplates voluntary compliance. *See, e.g., Local 93, International Association of Firefighters v. City of Cleveland*, 106 S. Ct. 3063, 3072 (1986).

The Agency relied on overwhelming statistical proof to conclude that affirmative action was necessary to remedy a severe underrepresentation of women. Statistical disparity is probative of past discrimination. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 339 (1977). Therefore, regardless

of the level of proof that this Court imposes on the Agency, the affirmative plan is valid. Under the better approach, the plan was valid as a reasonable response to a conspicuous absence in the work force of the minority members Congress sought to protect in Title VII. This standard addresses the need for remedial measures from the viewpoint of the employer. Even under a more stringent test, however, the Agency has demonstrated sufficient evidence of sex discrimination to justify its plan. As the court of appeals pointed out, the Agency's statistical evidence alone would make out a prima facie case of discrimination against women. Pet. App. 49a n.5.

This case asks that the Court reaffirm the long-standing principle that the plaintiff in a disparate treatment Title VII case carries the burden of persuading the court that his employer has engaged in illegal discrimination. *Wygant*, 106 S. Ct. at 1848, 1856. Petitioner's attempt to devise a presumption that all affirmative action plans are invalid and to place the burden of proving their validity on the employer should be rejected. The district court was simply mistaken in placing the burden of proof on the Agency, and its ruling in favor of Petitioner was properly reversed for that reason.

The Agency's plan was flexible and fair and was applied in a reasonable manner. It did not create an absolute preference for women or encourage layoffs of men. *Cf. Wygant*, 106 S. Ct. at 1851-52. The plan did not require the Agency to promote a woman to the road dispatcher position, nor did it impose a rigid goal. Rather, it expressed a desire to remove "any possible barriers to employment and promotion" of women and to "attain an equitable representation" of women at all job levels. J.A. 31. By considering gender as an additional positive factor, the Agency applied a fair policy in a flexible manner, thereby protecting the interests of male employees. Thus, the plan neither served as an absolute bar to the advancement of men nor unnecessarily trammeled their interests.

The purposes of the Agency's affirmative plan mirrored the very purposes of Title VII. *Cf. Weber*, 443 U.S. at 208. The

federal courts should accord employers the freedom and discretion to take voluntary action in order to remedy entrenched patterns of discrimination. Title VII demands no less.

ARGUMENT

Last Term's attack on affirmative action by the Department of Justice failed in the face of a consistent recognition by the Court that narrowly-drawn, flexible, temporary affirmative action plans are a useful and permissible tool for the correction of the results of a history of discriminatory hiring. Without permitting the exclusion of members of the majority from a job classification, the Court's decisions opened the way to voluntary affirmative action programs which would bring members of minority groups into positions from which they have previously been virtually — or in this case totally — excluded.

Rather than rejoice in this announcement that Congress in enacting Title VII had properly opened employment to those who had been systematically excluded from job opportunities, the Department of Justice now asks the Court to limit the scope of the Court's decisions by hedging them round with restrictions which would mean that the effects of exclusion cannot be corrected, however willing the employer may be to do so. By arguing that the employer must prove as an affirmative defense that imbalance in the work force sought to be corrected by its affirmative action plan was the result of its prior discrimination, the government would place a two-fold burden on employers. First, it makes it easier for an employer to do nothing to correct long term discrimination unless a victim of that discrimination comes forward to sue. Second, it raises the likelihood that the proof required to justify the affirmative action plan will become the basis of damage suits which would otherwise never exist.

The century and more since the enactment of the Fourteenth Amendment have not changed the basic fact that minorities are by definition less powerful than majorities in a democracy. Employers do not adopt affirmative action plans because they are popular; they adopt them because they recognize

that minority employees and job applicants have suffered discrimination at the hands of the majority. The standards of proof adopted by the court of appeals here were appropriate to the purposes of the Fourteenth Amendment, Title VII, and this Court's decisions interpreting those provisions.

RESPONDENT AGENCY WAS JUSTIFIED IN INSTITUTING AND APPLYING ITS FLEXIBLE AND FAIR AFFIRMATIVE ACTION PLAN TO REMEDY A CONSPICUOUS DISCRIMINATORY PATTERN OF EMPLOYMENT.

Weber and its progeny make clear that Title VII does not forbid employers from voluntarily instituting affirmative action plans that accord racial preferences. *United Steelworkers of America v. Weber*, 443 U.S. 193, 200 (1979); *Local 28 of the Sheet Metal Workers' International Association v. EEOC*, 106 S. Ct. 3019, 3072-73 & n.8 (1986). Indeed, the Court has extolled their virtues in avoiding litigation and in fulfilling the clear, congressional intent to encourage voluntary compliance with Title VII. *See Local 93, International Association of Firefighters v. City of Cleveland*, 106 S. Ct. 3063, 3072 (1986) ("[w]e have on numerous occasions recognized that Congress intended for voluntary compliance to be the preferred means of achieving the objectives of Title VII"). The *Weber* Court emphasized:

> It would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had "been excluded from the American Dream for so long," constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.

223 U.S. at 204 (citation omitted). Similarly, the Equal Employment Opportunity Commission's guidelines on affirmative action, Affirmative Action Appropriate Under Title VII of the Civil Rights Act of 1964, As Amended, ("Affirmative Action Guidelines"), recognize the congressional intent to encourage

voluntary affirmative action. 29 C.F.R. § 1608.1 (1985). The EEOC's interpretations of Title VII are entitled to great weight. *See, e.g., City of Cleveland*, 106 S. Ct. at 3073.

The Court has also made clear that remedial measures need not be limited to actual victims of past discrimination. *Sheet Metal Workers*, 106 S. Ct. at 3054. The United States' assertion that the Agency's plan was improper because it was not "victim-specific" is, thus, a fallacious repetition of rejected arguments. Although it asks the Court to rule that the Agency must justify its use of "gender discrimination in favor [of] nonvictims" to remedy historical imbalances, as opposed to "some less disfavored" remedy, the United States nevertheless admits—as it must—that *Sheet Metal Workers* resolved this question against it. Brief for the United States as Amicus Curiae Supporting Petitioner at 30, 12-13.

In fact, this Court has recognized that affirmative action is a valuable tool in avoiding and remedying the effects of discrimination. This case gives the Court the opportunity to establish definitive prerequisites of a valid affirmative action policy. Title VII and this Court's cases interpreting Title VII point the direction those prerequisites should take.

A. The Agency's Voluntary Sex-Conscious Promotion Policy Is Presumptively Valid under Title VII Because the Agency Had a Firm Basis for Concluding That Remedial Action Is Appropriate.

The first principle is that to promote the remedial policies underlying Title VII and to avoid discouraging employers from rectifying discrimination, an affirmative action plan instituted by an employer that has a firm basis for concluding that remedial action is appropriate should be presumptively valid. As this Court stated in *Wygant*, employers must only have "convincing evidence that remedial action is warranted" in order to justify taking affirmative measures. 106 S. Ct. at 1848.

Justice Powell, writing for the plurality in *Wygant*, emphasized that the need for remedial action must be determined by the employer itself. The opinion did not require employers to

carry the same evidentiary burden that an employee would have to bear to succeed in an action to enforce Title VII. All that is necessary is that an employer:

> . . .have sufficient evidence to justify the conclusion that there has been prior discrimination.
>
> . . .[T]he trial court must make a factual determination that the employer had a strong basis in evidence for its conclusion that remedial action was necessary. The ultimate burden remains with the employees to demonstrate the unconstitutionality of an affirmative action program.

Id.

The proper standard for testing the validity of an affirmative action program must be devised in light of the congressional preference for voluntary attainment of equal employment opportunity. *See, e.g.*, H.R. Rep. No. 914, 88th Cong., 1st Sess., pt. 1, at 18 (1963) ("[n]ational leadership provided by the enactment of Federal legislation dealing with the most troublesome problems [of discrimination] will create an atmosphere conducive to voluntary or local resolution of other forms of discrimination."). *See also* Affirmative Action Guidelines, 29 C.F.R. § 1608.1 (1985) (exposing employers who engage in affirmative action to Title VII liability threatens to "immobilize or reduce the efforts of many who would otherwise take action to improve the opportunities of minorities and women without litigation, thus frustrating the Congressional intent to encourage voluntary action . . . .").

Thus, Justice Blackmun asserted in *Weber:*

> Strong considerations of equity support an interpretation of Title VII that would permit private affirmative action to reach where Title VII itself does not. The bargain struck in 1964 with the passage of Title VII guaranteed equal opportunity for white and black alike, but where Title VII provides no remedy for blacks, it should not be construed to foreclose private, affirmative action from supplying relief. It seems unfair for respondent Weber to argue, as he does, that the asserted scarcity of black craftsmen in Louisiana,

> the product of historic discrimination, makes Kaiser's training program illegal because it ostensibly absolves Kaiser of all Title VII liability. . . . Absent compelling evidence of legislative intent, I would not interpret Title VII itself as a means of "locking in" the effects of segregation for which Title VII provides no remedy.

443 U.S. at 214-15 (Blackmun, J., concurring).

Employers must be free to utilize affirmative action when they have a firm basis for concluding that remedial measures are appropriate. The Agency has made a strong showing of a firm basis for remedial action.

1. The Agency Instituted Its Plan Based on Convincing Evidence of Discrimination.

The absence of women from a traditionally male job category raises an inference of discrimination. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 339 (1977). An employer, faced with stark statistical disparity in its workplace, must be given the freedom to remedy what it perceives to be the effects of past discrimination on its part. No one is in a better position to draw a reasonable inference that discrimination may have caused the statistical imbalances than the employer itself.

In 1978, Agency records demonstrated that absolutely none of the Agency's skilled craft workers were women. In fact, skilled craft was the only job category in the Agency that lacked women. 1978 Plan, J.A. 49. In 1978, the Agency further recognized that women were underrepresented in the Agency as a whole, particularly in job classifications that are traditionally male. *Id.* at 51. In fact, in its 1978 Plan, the Agency characterized women as "the most underrepresented group in the Agency." *Id.* at 53. The Agency attributed the underrepresentation largely to "entrenched patterns" and "hidden discrimination" in its "selection and appointment processes." *See id.* at 71, 85, 65, 35.

It is clear beyond peradventure that statistical disparity is probative of employment discrimination. *Bazemore v. Friday*,

106 S. Ct. 3000, 3008-09 (1986) (statistical wage disparities constitute probative evidence of discrimination); *Weber*, 443 U.S. at 197-99 (statistical disparities indicate racial imbalances in traditionally segregated job categories); *Hazelwood School District v. United States*, 433 U.S. 299, 307-08 (1977) (gross statistical disparities alone may constitute prima facie proof of a pattern or practice of discrimination); *Teamsters*, 431 U.S. at 339 (statistical evidence is important and competent in proving employment discrimination). This Court has not required plaintiffs in enforcement suits or employers defending affirmative action plans to amass conclusive proof of a causal nexus between statistical imbalances and discriminatory conduct. The *Bazemore* Court explicitly held that a plaintiff in an enforcement suit under Title VII need not prove discrimination with a scientific certainty. 106 S. Ct. at 3009.

The historical and recurring exclusion of women from skilled craft jobs is sufficiently pervasive to warrant judicial notice. The relative absence of women from traditionally male jobs has been caused by widespread, individual instances of discrimination, not merely "societal discrimination." *See, e.g., Kyriazi v. Western Elec. Co.*, 461 F. Supp. 894 (D.N.J. 1978) (company systematically denied women employment opportunities in traditionally male jobs); N.Y. Times, Jan. 1, 1984, § 3, at 1, col. 3 (skilled craft jobs, from which women have been excluded, still held predominantly by men). The United States Department of Labor has noted that although women have been interested in skilled craft work, sex discrimination has limited their participation. U.S. Dep't of Labor, Women's Bureau, No. 17, *A Woman's Guide to Apprenticeship* 4 (1980) ("*A Woman's Guide to Apprenticeship*"). *See also* Coal Week, Mar. 29, 1982, vol. 8, no. 13, at 3 (LEXIS, Nexis library, Omni file) (coal contractors have no intentions of hiring women miners until forced to do so by the government); Associated Press, Washington Dateline, Feb. 18, 1982 (LEXIS, Nexis library, Omni file) (women desiring construction jobs face discrimination); United Press International, Regional News, Nov. 17, 1982 (LEXIS, Nexis library, Omni file) (women equipment operators face discrimination); United Press International, Regional News, June 25, 1981

(LEXIS, Nexis library, Omni file) (women denied construction jobs).

Many recent studies have demonstrated that despite some progress attributed in part to affirmative action, women are largely excluded from skilled craft jobs. *See, e.g.*, Committee on Women's Employment and Related Social Issues, *Women's Work, Men's Work — Sex Segregation on the Job*, National Academy Press, Washington, D.C., 27 table 2-5 (B. Reskin & H. Hartman ed. 1986) ("*Women's Work*"); Herbert Hammerman, *A Decade of New Opportunity: Affirmative Action in the 1970's*, Potomac Institute, Washington, D.C., 70-71 & 77 table V-8 (no progress in state and local government employment of women in skilled craft positions between 1973 and 1980). In addition, all indications are that discrimination is largely responsible for the dearth of women in skilled craft and other traditionally male jobs. *A Woman's Guide to Apprenticeship, supra*, at 4. As soon as employers open opportunities to women, women have quickly shown their eagerness to enter nontraditional jobs. *Women's Work, supra*, at 76-77. The Agency itself concluded that "[i]ndications are that there is an increasing percentage of women in the area who desire to work in non-traditional positions. This makes it desirable to . . . provide them an opportunity to compete for available positions." 1978 Plan, J.A. 66.

Historical discrimination against women is no stranger to the Transportation Agency. Indeed, despite a County work force comprised of 36.4% women, the Agency employed no women in its 238-man skilled craft category. J.A. 54. This contrasts with Department of Labor statistics showing that approximately 6% of craft workers nationwide in 1981 were women. *Women's Work, supra*, at 27 table 2-5. The statistical disparity in the Agency is even greater than that which convinced the Court that the voluntary affirmative action plan in *Weber* was justified. In *Weber*, 1.83% of the skilled craft workers at the plant in question were black, despite a work force in the area that was approximately 39% black. 443 U.S. at 198-99. Citing numerous judicial findings of exclusion from crafts on racial grounds, the *Weber* Court took judicial notice of the racial discrimination that led to the affirmative action plan. *Id.* at 198 n.1. The exclusion of women from

the traditionally male jobs at the Agency similarly supports the conclusion that sex discrimination on the part of the Agency was at play. After all, it is the Agency that chooses the composition of its workforce and is legally accountable for that choice.

Thus, as the court of appeals determined, the statistics in this case would make out a prima facie case of discrimination against women by the Agency. Pet. App. 49a n.5. *See also Setser v. Novack Investment Co.*, 657 F.2d 962, 968 (8th Cir.) (in banc) (showing of conspicuous statistical imbalance was sufficient to justify affimative action plan), *cert. denied*, 454 U.S. 1064 (1981). In addition, as noted above, there was evidence of discriminatory behavior by the Agency.

The possibility that employment decision making may be infused with sexual biases, especially in traditionally male jobs, highlights the need for affirmative action policies in general and the use of the Agency's affirmative action plan in particular. Where employers have structured their workplaces in ways that have reinforced gender segregation, goals and timetables have been effective in opening employment opportunities to women in sex-segregated industries. *Women's Work*, *supra*, at 81, 131; *A Woman's Guide To Apprenticeship*, *supra*, at 2-3. The plan explicitly stated that the Agency should attempt to attain a "reasonable" approximation of work force composition by being sensitive to employment opportunities at each level of the personnel decision-making process. J.A. 61. The plan further provided that annual short range employment goals, established to meet long range goals, must "permit adjustments . . . as may be necessary because of limitations on hiring or reductions in the County work force . . ." *Id.* A short term goal to attain a fair representation of women in the workplace forces selection officials to reevaluate personnel decision making and standards necessary for job performance in order to ensure fair competition for underrepresented groups. As part of this process, the intervention of more responsible and objective supervisors is crucial to guarantee that lower level selection officials do not continue to rely on exclusionary ethnic and gender stereotypes.

The Agency's affirmative action representative and, most importantly, the Agency Director, fulfilled this function in this

case. The Director, who had not personally worked with any of the candidates, brought a more responsible and detached viewpoint into the decision-making process. The Director was responsible for hiring and promotion in the Agency, as well as for meeting the Agency's affirmative action goals. As he testified, the Director had on numerous occasions made the final decision in promoting an employee. Transcript at 53. Infusing traditionally discriminatory hiring and promotion decision making with an official sensitive to equal employment opportunity is crucial in reversing discriminatory patterns and practices in employment.

2. The Plan Was Flexible, Remedial, and Temporary, and Does Not Serve as an Absolute Bar to the Advancement of Men.

Recognizing the stark gender disparities in its workplace, and acting on its commitment to achieving employment opportunities for all, the Agency created an affirmative action plan. The 1978 Plan provided:

> The County and Transit District Boards of Supervisors recognize that mere prohibition of discriminatory practices is not enough to remedy the effects of past practices and to permit attainment of an equitable representation of minorities, women and handicapped persons. Affirmative, aggressive, continuing actions are required to attain this goal.
>
> Consequently, it is the will of the County and Transit District Boards of Supervisors that the Transportation Agency take affirmative continuing action as required to assure that:
>
> a. Employment by the Agency is kept freely open to all persons regardless of race, color, national origin, religion, sex, age, or handicapped status.
>
> b. Any possible barriers to employment and promotion of minorities, women, and handicapped persons are removed.

> c. Aggressive and imaginative continuing efforts are made to attract and assist minorities, women and handicapped persons to qualify for employment and promotion as needed to attain an equitable representation in all occupational fields and at all job levels.

J.A. 31-32.

The Agency set a long range goal of attaining a work force whose composition approximates the distribution of women in the Santa Clara County work force. *Id.* at 54. Setting a figure to be modified according to new Census Bureau data, the Agency determined that 36.4% of the County work force comprised women. *Id.* The 1978 Plan recognized serious barriers to its goal. For example, the plan noted that the positions in which women are underrepresented require specialized training and experience, which many women lack because of their relative absence from those traditionally male jobs. *Id.* at 56. Moreover, the plan noted that a low turnover rate among employees leaving the Agency made positions for advancement relatively rare. *Id.* In addition, the plan stated that many women do not naturally apply for jobs in which they have faced limited opportunities in the past. *Id.* at 57.

The United States wholly mischaracterizes the intent and function of the plan. The plan was formulated after a thoughtful self-examination of discriminatory patterns in employment and has been administered in a fair and extremely flexible manner. The Agency's use of the plan can by no stretch of the imagination be considered "untrammeled" or "casual social engineering heedless of individual rights." Brief for the United States as Amicus Curiae Supporting Petitioner at 9, 15.

Typical of most affirmative action plans, the Agency's plan set long range goals based on the availability of minorities and women in the area labor force as a means of monitoring the performance in each part of its employment and identifying proper areas in which specific affirmative steps would have to be taken.

The 1978 Plan made clear that the " 'goals' established for each Division should not be construed as 'quotas' that must be met." *Id.* at 64. The plan further specified that: "The 'goals'

should rather be seen as realistic desired levels of achievement correcting imbalances in a Division's work force. Goals should take into account such factors as turnover, layoffs, lateral transfers, new job openings, retirements, and availability of minority, women, and handicapped persons in the area work force who possess the desired qualifications or potential for placement." *Id.*

It is therefore incorrect to claim that the terms and structure of the plan improperly "manipulate the numerical balance of the work force." Brief for the United States as Amicus Curiae Supporting Petitioner at 26. The Agency's monitoring of statistical representation of women in the workplace is precisely how an employer should identify and resolve discriminatory imbalances. In order to ascertain whether discrimination is occurring, an employer necessarily monitors the employment of women and other groups in its workplace. The Justice Department criticizes these long range "monitoring" goals as over-inclusive, but fails to explain how the employer could possibly identify situations of discrimination against a particular group unless it first measured its employment of members of that group against the long range "monitoring" goals based on labor force availability.

The Agency's short term employment goals are by their nature temporary. As the Agency's Director testified, the plan is annually reviewed and modified. Transcript at 50. The annual reviews result in new short term and long term goals. *Id.* As the court of appeals noted, "the Plan is not intended to maintain male-female balance, but simply to eliminate a manifest male-female imbalance. Implicit in the Plan is the intent to stop taking sex into account once the long-range percentage goals are attained. Nothing in the Plan indicates a contrary intent." Pet. App. 25a.

Even the Agency personnel officials understood that the plan was a temporary remedial mechanism. For example, one personnel official, asked at trial whether the plan "was going to go on in perpetuity," responded: "My understanding was that it would go on until the goals were achieved. . . .[I]n an area in which the goal had been met or exceeded, the plan had no role to play, in the hiring decision or recruitment or any other aspect of employment." Transcript at 242-43.

In its 1978 Plan, the Agency explicitly recognized that attaining the desired goals will take a long time. J.A. 58, 60. Before formulating the 1978 Plan, the Agency had in 1972 devised a five-year plan without short term goals. J.A. 37-38. Given the continued underrepresentation of women and minorities five years after the original plan was initiated, *id.*, it was obvious that the Agency would not eliminate discriminatory patterns of employment within a particular, specified period of time. The absence of an "ending date" in the 1978 Plan reflects only the Agency's realistic assessment — underscored throughout the plan — that the plan's goals would not be met for quite a long time, particularly in the traditionally male job categories. Indeed, studies have shown that breaking down discriminatory barriers to the employment of women in nontraditional jobs has been slow, despite affirmative action efforts. Hammerman, *supra*, at 59 table IV-3, 63 table IV-8; Jonathan S. Leonard, *The Impact of Affirmative Action* 110, 134-35, 150 table 4.3, 385, 388 (1983). One explanation is that affirmative action has a shorter history for women than for other groups. *Id.* at 102, 121. Attainment of gender goals may take a long time. This, however, does not make the attainment effort perpetual. The Agency's 1978 Plan was therefore a temporary measure that satisfies all requirements set forth by this Court in *Weber*, 443 U.S. at 208.

In order to assure that race-conscious remedies do not unduly injure nonminorities, this Court has required that the remedy neither serve as an "absolute bar" to the advancement of nonminorities nor "unnecessarily trammel" the interests of the latter. *Weber*, 443 U.S. at 208. *See also Sheet Metal Workers*, 106 S. Ct. at 3052-53. The court of appeals correctly concluded that the Agency's plan does not absolutely bar the advancement of male employees. "When there is but one opening, the selection of one candidate will necessarily result in exclusion of all others." Pet. App. 28a. That court further explained that absent a distinct pattern of exclusion of nonminority candidates from particular positions, it could not "conclude that a single employment decision serves as a bar or unnecessarily trammels the interests of other employees." Pet. App. 29a.

The Agency's affirmative action plan is fair and flexible. Furthermore, the Agency fairly applied it in this case. Having expressed an interest in the dispatcher position in 1972, Joyce obtained nearly five years of road maintenance experience in order to qualify for the job. After passing a series of examinations, Joyce ranked among seven men as a qualified candidate for promotion to the position of road dispatcher. In her nearly five years as a road maintenance worker, Joyce performed a wide variety of road maintenance jobs for the County. In addition, Joyce had eighteen years of previous clerical experience, including three-and-one-half years as a road yard clerk. While she was a road yard clerk, Joyce filled in as a road dispatcher on a part-time basis. Petitioner's experience was similar in that he had a few years of road maintenance work experience, eleven years as a road yard clerk and several months of unofficial experience as an "out-of-class" road dispatcher for the County. Under Agency practice, Joyce and Petitioner were equally qualified.

The Agency's appointing authority, its Director, testified that based on the prior experience of the two candidates and their close rankings after two oral boards, he perceived no material difference in their relative qualifications. The Director testified that he "knew that the scores were relatively close . . . , and that certainly, to my mind, if they were within a couple of points, I don't consider that a significant variation. . . . in my own mind, based on what I had been told about their qualifications and reviewed on my own, I felt that both of them were capable of handling the job, and that both of them had the qualifications necessary to perform tasks required as part of the job." Transcript at 24.

As the Director testified, he had discretion to take numerous factors into account in making the promotion, and "the raw ranking, or the raw test score, is only one of the factors to be considered." *Id.* at 54-55. Furthermore, in commenting on the practical effect of this single promotion, the Director testified that "it provided [that] one of . . . 270 positions was now occupied by a female incumbent . . . . [P]hilosophically it made a larger impact in that it probably has encouraged other females and minorities to look at the possibility of so-called

'non-traditional' jobs as areas where they and the Agency both have samples of a success story." *Id.* at 64. In light of the Agency's need for her qualifications and experience, it cannot be said that the Agency promoted Joyce solely because of her gender. Rather, gender was merely one factor that management considered in choosing between several qualified candidates.

Although the 1978 Plan encouraged the promotion of minorities and women, it did not create an absolute preference for women and minorities or encourage layoffs of men and nonminorities. In partial reliance on the plan, the Agency promoted the first woman skilled craft worker in its history, without foreclosing the advancement opportunities of men. The plan is a flexible attempt to remedy a gross statistical imbalance in the work force. The plan paved the way for management to exercise its discretion "to eliminate conspicuous [gender] imbalance in traditionally segregated job categories." *Weber*, 443 U.S. at 209. The Court has approved the exercise of that discretion despite the fact that the benefit accorded one employee may indirectly injure another.

The Agency has instituted precisely the type of reasonable remedial measures that the Court and Congress have long endorsed. *Sheet Metal Workers*, 106 S. Ct. at 3053; *Wygant*, 106 S. Ct. at 1848 (plurality opinion); *id.* at 1861 (Marshall, J., dissenting); *Weber*, 443 U.S. at 209. In adopting the 1978 Plan, the Agency attempted to begin to correct what it perceived to be a "great under-representation" of women. *See* 1978 Plan, J.A. 45. In particular, the Agency lamented the extraordinary underrepresentation of women in technical and skilled craft job classifications. *Id.* at 58 ("It is particularly evident that it will be extremely difficult to significantly increase the representation of women in technical and skilled craft job classifications where they have traditionally been greatly underrepresented."). Ignoring the plan's express remedial purpose and the gross statistical disparities between the total absence of women in skilled craft jobs and the number of women in the relevant labor pool, Petitioner and the United States urge this Court to adopt an unnecessarily stringent threshold of proof that the plan is remedial.

The application of an affirmative action plan inevitably disappoints some expectations. Nevertheless, Title VII undoubtedly allows an employer to consider gender in choosing between several qualified candidates in order to break down sex segregation and provide equal opportunity for women in the workplace. To invalidate an affirmative action plan anytime someone is injured would defeat the very remedial purposes of Title VII by tying the hands of employers "who wish to express and act upon their commitment to social justice." Pet. App. 24a.

The Agency has demonstrated that it embarked on its affirmative action program in light of overwhelming and convincing evidence that remedial action was warranted to remedy a conspicuous imbalance in its work force. The Agency's own conclusion that its continuing history of excluding women from upper-level and traditionally male jobs justified remedial measures should be respected. Petitioner's argument that affirmative action plans should be treated as presumptively invalid wholly ignores this Court's pronouncements in *Weber* and its progeny that reasonable remedial measures not only comply with Title VII, but also "mirror" the very purposes of Title VII. *Weber*, 443 U.S. at 208. In addition, as discussed below, Petitioner's premise incorrectly places the burden of persuading the Court that a plan is valid on the employer.

3. The Agency Must Not Be Required To Admit or Prove That It Has Discriminated in Order To Institute or Apply an Affirmative Action Plan.

To require employers to wait until they are forced to defend and lose a discrimination lawsuit before they are legally permitted to correct conspicuous discriminatory patterns of employment would be absurd. Nor should employers be required, in effect, to bring such a lawsuit against themselves as part of the justification for an affirmative action plan. In *Wygant*, five Justices explicitly refused to require a finding of past discrimination as a prerequisite to affirmative action. Justice O'Connor rejected the assumption that any affirmative action plan not prefaced by

the employer's own admission of illegal discrimination necessarily addresses only "societal discrimination." 106 S. Ct. at 1854. Moreover, as Justice O'Connor explained, the plurality did not impose a prior finding requirement:

> I believe that this assumption is false and therefore agree with the Court that a contemporaneous or antecedent finding of past discrimination by a court or other competent body is not a constitutional prerequisite to a public employer's voluntary agreement to an affirmative action plan.
>
> . . .
>
> The imposition of a requirement that public employers make findings that they have engaged in illegal discrimination before they engage in affirmative action programs would severely undermine public employers' incentive to meet voluntarily their civil rights obligations.

Id. at 1854-55 (O'Connor, J., concurring in part and concurring in the judgment). *See also id.* at 1848-49 (plurality opinion) (employer itself must conclude that sufficient evidence of discrimination justifies affirmative action). Justices Stevens, Marshall, Brennan and Blackmun similarly concluded that a finding that an employer is guilty of past discrimination is not a prerequisite to remedial measures. *Id.* at 1867 (Stevens, J., dissenting); *id.* at 1862-63 (Marshall, J., dissenting). Thus, it appears that at least eight Justices agree that an employer need not prove its own past discriminatory conduct in order to use affirmative action.

Petitioner is incorrect in claiming that the Agency must make a wholesale effort to prove a case of discrimination against itself in order to justify its plan. A requirement that employers admit illegal discrimination before using preferences would create a fatal disincentive to voluntary Title VII compliance. In order to correct the effects of past discrimination, an employer would have to make admissions which would invite expensive litigation by excluded minority members. No Title VII standard should impose such a practical burden on employers wishing to take affirmative measures. The County counsel told the district

judge during opening argument in this case that "we certainly don't want to attempt to prove that the County has discriminated in the past, but I think Your Honor will recognize that we are in a very vulnerable position in terms of Title VII, as a matter of defending history, given the very few women who have ever held the position of responsibility in road maintenance." Transcript at 12. *See also id.* at 292 (County counsel hesitant to admit past discrimination).

Requiring employers to identify instances and victims of past discrimination, thereby exposing themselves to Title VII claims for backpay and other relief, would contravene the very purpose of Title VII. *Wygant*, 106 S. Ct. at 1855 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 1862-63 (Marshall, J., dissenting); *Weber*, 443 U.S. at 211 (Blackmun, J., concurring) (an employer required to identify victims of past discrimination would inevitably face claims for backpay). Even the United States recognizes in its amicus curiae brief that any rules designating the quantum of proof required to demonstrate an adequate remedial purpose must "be sensitive to an employer's understandable reluctance to concede guilt, opening him to liability for past discrimination against women or minorities. . . ." Brief for the United States as Amicus Curiae Supporting Petitioner at 17. Moreover, a contemporaneous finding requirement would promote form over substance by approving plans merely because they contain inculpatory statements admitting past discrimination and rejecting plans lacking such statements.

Nevertheless, the United States reiterates an argument that this Court already rejected when it states that a voluntary affirmative action program is valid only when "a Court could order the program as a remedy." Brief for the United States as Amicus Curiae Supporting Petitioner at 18-19 (quoting United States Brief, *United Steelworkers of America v. Weber*, at 21-22). The *Weber* Court, however, highlighted the distinction between the question of "what Title VII requires or. . . what a court might order to remedy a past proved violation of the Act [and] whether Title VII *forbids* private employers and unions from voluntarily

agreeing upon bona fide affirmative action plans that accord racial preferences . . . ." 443 U.S. at 200 (emphasis by Court). We are not in this case confronted with an arguably intrusive exercise of district court power over the promotion decisions of an employer. *Cf. City of Cleveland*, 106 S. Ct. at 3076-77.

An affirmative action plan voluntarily adopted by an employer need not be justified by the same quantum of proof that a plaintiff would have to produce in order to sustain a case of discrimination. Affirmative Action Guidelines, 29 C.F.R. § 1608.1(c) (1985). In this case, the Agency has clearly articulated a legitimate reason for preferring Joyce over Petitioner on the basis of gender. It is not required to show more.

4. The Burden of Proof as to the Validity of an Affirmative Action Plan Rests with the Party Attacking the Plan.

Petitioner failed to meet his burden of proving the 1978 Plan invalid. Moreover, the district court improperly placed the burden of proving the plan valid on the Agency. That court stated that "[t]he burden is upon defendant to prove historical justification." Pet. App. 9a. Petitioner unpersuasively argues that the longstanding principle that the plaintiff in a Title VII disparate treatment case carries the burden of proving his case does not apply to this lawsuit. Petitioner's Brief at 45-46.

As this Court made clear in *Wygant*, the ultimate burden remains with the employee to demonstrate the invalidity of an affirmative action program. 106 S. Ct. at 1848 (plurality opinion), 1856 (O'Connor, J., concurring in part and concurring in the judgment). Justice O'Connor explained in *Wygant:*

> In "reverse discrimination" suits, as in any other suit, it is the plaintiffs who must bear the burden of demonstrating that their rights have been violated. . . . [W]hen the Board introduces its statistical proof as evidence of its remedial purpose, thereby supplying the court with the means for determining that the Board had a firm basis for concluding that remedial action was appropriate, it is incumbent upon the nonminority teachers to prove their case; they continue to bear the ultimate burden of persuading the

> court that the Board's evidence did not support an inference of prior discrimination and thus a remedial purpose, or that the plan instituted on the basis of this evidence was not sufficiently "narrowly tailored." Only by meeting this burden could the plaintiffs establish a violation of their constitutional rights, and thereby defeat the presumption that the Board's assertedly remedial action based on the statistical evidence was justified.

Id.

The Agency demonstrated that it had a firm basis for concluding that its affirmative action plan was necessary to remedy a conspicuous discriminatory pattern of employment. Under *Weber* and its progeny, including the recent decisions handed down by this Court last Term, an affirmative action plan that satisfies the Court's substantive standards is a legitimate and lawful justification for preferring a qualified woman over a qualified man. *Sheet Metal Workers*, 106 S. Ct. at 3050 (affirmative action may be necessary to enforce Title VII effectively); *Weber*, 443 U.S. at 197 (Title VII permits voluntary race-conscious affirmative action plans).

Petitioner has failed to carry its burden of proving that the 1978 Plan is invalid. Rather, the plan represents a bona fide attempt to remedy the vestiges of past discrimination. Petitioner has failed to prove that the Agency instituted the plan for no valid remedial purpose.

B. The Agency Was Justified in Promoting a Woman Certified as "Qualified" to a Traditionally Male 238-Employee Job Category Which Had Never Included a Woman.

Here, years of discrimination, whether purposeful exclusion of women from traditional male occupations or "benign" refusal to open jobs to them, have resulted in an all-male force in one of the Agency's skilled employment categories. There is no way to know who would have taken those positions had the Agency maintained an open door policy to women over its history. It is clear that Diane Joyce, a qualified woman, wanted the job now, and was correctly given it.

If affirmative action is to have any effect, its benefits cannot be limited to actual victims of discrimination. *See Sheet Metal Workers*, 106 S. Ct. at 3054. Accordingly, employers may legally consider gender in making promotions. *Cf. Sheet Metal Workers*, 106 S. Ct. at 3074 (district court may order preferential relief benefitting individuals who are not actual victims of discrimination); *City of Cleveland*, 106 S. Ct. at 3073 n.8 (public employer may sometimes voluntarily agree to take race-conscious measures for legitimate remedial purposes consistent with the Fourteenth Amendment and Title VII). This Court has repeatedly held that, in the proper circumstances, employers may take race or sex into account in making employment decisions. *Wygant*, 106 S. Ct. at 1848 (plurality opinion); *id.* at 1853 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 1861 (Marshall, J., dissenting); *id.* at 1869 (Stevens, J., dissenting); *Fullilove v. Klutznick*, 448 U.S. 448, 491 (1980) (Burger, C. J.); *id.* at 519 (Marshall, J., concurring in the judgment); *Weber*, 443 U.S. at 204; *University of California Regents v. Bakke*, 438 U.S. 265, 359 (1978) (Brennan, J., concurring in the judgment in part and dissenting in part).

In promoting Joyce, the Agency legally considered her gender as an additional positive factor possessed by an experienced employee rated qualified for the position. That Joyce, even though she was not a proven victim of discrimination, benefitted from the Agency's affirmative action plan is thoroughly consistent with *Weber* and *Sheet Metal Workers*. This is also the only way that the years of all-male hiring which led to the Agency's only single-sex job classification could be brought to an end. That is the purpose of lawful affirmative action.

CONCLUSION

Affirmative action of the type engaged in by the Agency here is the only way to redress generations of discrimination whose victims are not available to seek redress on their own behalf. Without it, patterns of discrimination cannot be undone in the forseeable future. In attacking the Agency's plan and its application, Petitioner failed to satisfy his burden of proving that

the Agency violated Title VII. The Agency acted legally in instituting and applying its flexible affirmative action plan to remedy a conspicuous discriminatory pattern of employment. A voluntary affirmative action policy is presumptively valid under Title VII when the employer has a firm basis for concluding that remedial action is appropriate. Statistical disparity is probative of sex discrimination. Therefore, the Agency has produced sufficient evidence to justify its remedial purpose in creating a plan. The employer is not required to prove that it engaged in purposeful discrimination in order to justify an affirmative action plan. Nor does the employer carry the burden of proving that the plan is valid. Petitioner has failed to sustain his burden of proving that the plan lacks a convincing remedial purpose or that the plan unnecessarily trammeled the interests of male employees. Precluding an employer from promoting the first woman in a traditionally male position composed of hundreds of men, when that woman is clearly qualified, would stop affirmative action in its tracks.

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No. 85-1129

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

PAUL E. JOHNSON,
Petitioner,
v.
TRANSPORTATION AGENCY, SANTA CLARA COUNTY, CALIFORNIA, AND SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 715,
Respondents.

On A Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS IN SUPPORT OF THE RESPONDENTS

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MOTION BY THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") moves for leave to file the attached brief *amicus curiae* in support of the Respondents. In support of this motion the AFL-CIO states as follows:

1. The AFL-CIO is a federation of 93 national and international unions representing over 13,000,000 working men and women. The AFL-CIO's policy position on affirmative action plans, declared most recently by its Sixteenth Constitutional Convention, is that such plans are "necessary . . . to ensure that minorities and women

take their rightful places in our economic system and to achieve equality and harmony among the races."

2. The sole issue in this case is whether Respondent Santa Clara County violated Title VII of the Civil Rights Act of 1964, 42 N.S.C. § 2000e *et seq.*, by adopting and implementing a voluntary affirmative action plan. This Court has addressed a like question on only one occasion, in *Steelworkers v. Weber*, 443 U.S. 193 (1979). The AFL-CIO filed a joint brief in *Weber* with the United Steelworkers of America defending the lawfulness of the affirmative action plan that was at issue in that case.

3. The AFL-CIO has a somewhat different understanding of *Weber* than do the parties to this case. As explained in the attached brief, we believe that *Weber* teaches that an employer may engage in affirmative action without violating Title VII so long as the employer is acting to redress a historic imbalance in the employer's workforce, and without regard to the proof of the causes or possible causes of that imbalance. We seek to file the attached brief in order to present to the Court the basis for that reading of Title VII and of *Weber*.

4. Petitioner and the Respondents have consented orally to the filing of the attached brief. The timing of the filing, however, necessitates this motion, as explained below.

(a) This brief is being submitted within the deadline for the filing of the brief of the Respondent Service Employees International Union, Local 715 ("SEIU Local 715"), and four days after the deadline for the filing of the brief of the Respondent Transportation Agency, Santa Clara County, California (the "County"). The Clerk's office has informed us that because the deadline for the brief of *one* of the Respondents has passed and because the deadline of the other Respondent was extended only because that Respondent, through a misunderstanding, was not originally served with a copy of the brief for the United States, the filing of an *amicus*

curiae brief after the first deadline would not be considered timely under Rule 36.2, even though the brief is being filed "within the time allowed for the filing of the brief of [one of] the part[ies] supported."

(b) In deference to the Court, it is the AFL-CIO practice, in cases like the instant one in which a union affiliated with the AFL-CIO is a party, to consult closely with the affiliate with respect to the case, and to file a separate *amicus curiae* brief only if we find that we have something to add to what is contained in the union-party's brief. Given our practice of close consultation with counsel for the union-party in a case, we were, of course, put at the same disadvantage in completing our brief in this proceeding as SEIU Local 715. Until that Union determined its position, we could not determine whether or not it would be appropriate to prepare and file an AFL-CIO *amicus curiae* brief.

(c) It is our understanding that oral argument in this case will not be heard until November or December, 1986. Permitting the filing of this *amicus curiae* brief thus will not prejudice any of the parties to this case nor delay the Court's consideration of the matter. And because of the different approach we take, our presentation may be of assistance to the Court in considering the vital issue raised here.

WHEREFORE, the AFL-CIO requests that leave be granted to file the attached brief *amicus curiae*.

Respectfully submitted,

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BRIEF AMICUS CURIAE FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS IN SUPPORT OF THE RESPONDENTS

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") submits this brief *amicus curiae* contingent upon the granting of the foregoing motion for leave to file the brief. The interest of the *amicus curiae* is stated in the motion.

SUMMARY OF ARGUMENT

Two fundamental questions are posed in this case: first, has a sufficient predicate been shown to enable Respondent Santa Clara County (the "County") to engage in some form of affirmative action without violating Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*; and, if so, second, whether the particular means the County has adopted toward that end are consistent with Title VII.

In Part I we show that under *Steelworkers v. Weber*, 443 U.S. 193 (1978)—which, we demonstrate, is the controlling authority here—an employer may engage in at least some forms of affirmative action to redress a long-standing and conspicuous imbalance in the employer's workforce, without regard to the causes or possible causes of that imbalance. We further show that *Weber* squarely refutes the argument of Petitioner and the Solicitor General that a "history of past discrimination in which the employer has participated," Br. for the U.S. at 10, is a necessary prerequisite to lawful affirmative action under Title VII. And *Weber* equally clearly rejects Santa Clara County's theory that proof of an arguable violation of Title VII is a necessary prerequisite.

In Part II we show that the means chosen by the County to implement its affirmative action plan are lawful under Title VII. The County's affirmative action plan does not "unnecessarily trammel the interests of [nonminority] employees." *Weber*, 443 U.S. at 208. As in *Weber*, the County's plan "does not require the discharge

[or layoff] of [nonminority] workers," and does not "create an absolute bar to the advancement of white employees." *Id.* Indeed, the instant case is a far easier one than *Weber* in this regard for two reasons: first, the County uses gender only as a "plus" factor in making employment decisions and does not bar nonminorities from competing for any available opening; and second, the County's affirmative action plan does not disrupt any settled employment expectations.

The County's affirmative action plan likewise satisfies *Weber*'s requirement that affirmative action may be pursued only as a "temporary measure." 443 U.S. at 208. The County's plan is temporary in precisely the same way as was the plan at issue in *Weber*: neither contains an express terminal date but each is impliedly limited to achieving—and not maintaining—racial/gender balance. Any doubt on this score should be resolved (as it was in *Weber*) by construing the plan to render it lawful rather than unlawful.

ARGUMENT

I. THE ENDS OF THE AFFIRMATIVE ACTION PLAN

A review of the developing jurisprudence on the legality of affirmative action plans indicates that in a case challenging such a plan, it facilitates analysis to ask first whether a sufficient predicate has been shown to justify some form of affirmative action and, if so, to inquire second whether the particular form of affirmative action at issue is lawful. We therefore proceed in that manner treating with the first question in this Part of the Argument and the second question in Part II *infra*.

Petitioner's complaint in this case pleads a claim under only Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, J.A. 7, and, thus, as Petitioner states in his brief, "Petitioner only seeks relief under Title VII," Pet. Br. at 19. Accordingly, the threshold question here is when an employer (and a union) may, without running afoul of that statute, engage in voluntary affirmative action.

This Court has addressed that issue on only one occasion, in *Steelworkers v. Weber*, 443 U.S. 193 (1979), a case involving a *private* employer. In seeking the issuance of a writ of certiorari in this case, Petitioner —like the lower courts—treated *Weber* as the controlling precedent. *See* Pet. for Cert. at 9-10 (*Weber* "set forth the standard for voluntary affirmative action plans"). But in his brief on the merits, Petitioner—supported by the Solicitor General—argues that different "constraints may apply to a *public* employer's voluntary affirmative action plan under Title VII." Pet. Br. at 20 (emphasis added). In particular, Petitioner argues that "the strict scrutiny standard [of the Equal Protection Clause] must also be applied under Title VII to sex-based discrimination by a public employer under a voluntary affirmative action [plan]." *Id.* at 23. As we proceed to show, Petitioner is mistaken.

A.(1) Title VII contains a unitary set of prohibitions, set forth in § 703 of that Act, 42 U.S.C. § 2000e-2, which applies to all "employers," as that term is defined in § 701(b), 42 U.S.C. § 2000e-(b). At the time those prohibitions were enacted in 1964, public employers were expressly excluded from the definition of "employer." The prohibitions stated in § 703 thus were "enacted pursuant to the commerce power to regulate purely private decisionmaking [*and*] *w*[*ere*] *not intended to incorporate and particularize the commands of the Fifth and Fourteenth Amendments.*" *Weber*, 443 U.S. at 206 n.6 (emphasis added).

The exclusion of public employers from Title VII's coverage was repealed in the Equal Employment Opportunity Act of 1972, P.L. 92-261, but Congress did not at that time amend § 703 in any respect. It would be surprising, indeed, if the 1972 Congress' purpose in amending the *definitional* provision of Title VII was to create, *sub silentio*, new and unique substantive rules to govern the duties of the public employers thereby brought under the Act. And as this Court has concluded, Congress had no such hidden agenda; the legislative materials show

that "Congress expressly indicated the intent that the same Title VII principles be applied to governmental and private employers alike." *Dothard v. Rawlinson*, 433 U.S. 321, 332 n.14 (1977). *See also Firefighters v. Cleveland*, —— U.S. ——, 54 L.W. 5005, 5010 n.10 (July 2, 1986).[1]

(2) The Solicitor General argues that any "constitutional limitations" on affirmative action by public employers must be read into § 703 to "avoid[] an interpretation of Title VII which would render it *pro tanto* unconstitutional" and would "'authorize' unconstitutional behavior." Br. for the U.S. at 6, 10 n.5. Those constitutional limitations, as *Weber* makes clear, do not apply to private employers who voluntarily adopt, or agree in collective bargaining, to affirmative action plans since such actions are not "state action." *See* 443 U.S. at 200.

The Solicitor General's argument is wrong because this case concerns the reach of § 703, and that section "can hardly be said to 'authorize' anything at all: it is purely prohibitory." *County of Washington v. Gunther*, 452 U.S. 161, 169 (1981). Thus, a holding that § 703 does not *condemn* all affirmative action that the Constitution proscribes would not "render Title VII *pro tanto* unconstitutional," any more than the 1964 Act was ren-

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[1] In reporting the bill that became the 1972 Act, the Senate Committee on Labor and Public Welfare stated: "The Committee believes that the employees of State and local governments are entitled *to the same benefits and protections* in employment as the employees in the private sector of the economy." S. Rep. 92-415, 92nd Cong., 1st Sess. 9 (1971) (emphasis added), *reprinted in Legislative History of the Equal Employment Opportunity Act of 1972*) ("Leg. Hist."). Senator Williams, the chief sponsor of the bill, repeated this explanation during the Senate debates. *See Leg. Hist.* at 1113.

The Senate amended the Labor Committee's bill in other respects but accepted that Committee's proposal to extend the Act to public employers. *See Leg. Hist.* 1102-76, 1789-90. The bill adopted by the House contained no comparable provision. *See id.* 326-32. In Conference the House receded. *See id.* 1813 (joint explanatory statement of the Conference Managers.)

dered unconstitutional because that Act did not proscribe any act of public-sector discrimination. Rather, such a holding would mean simply that in enacting Title VII, Congress did not create an additional statutory remedy for all of the conduct that is remediable under the Constitution (and under 42 U.S.C. § 1983).

Because that is so, Petitioner's and the Solicitor General's reliance on *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979), *see* Br. for Pet. at 21; Br. for the U.S. at 10 n.5, is misplaced. *Catholic Bishop* wisely counsels that "there must be present the affirmative intent of Congress clearly expressed," before the Court will conclude that Congress intended to enact a law that "would give rise to serious constitutional questions." 440 U.S. at 501. That sound rule of construction—and of judicial restraint—simply has no application here as no constitutional question is implicated by the determination of the extent of the Title VII cause of action against affirmative action plans.[2]

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[2] Of course, if the Solicitor General were correct—if "any constitutional limitations on [affirmative action] carry over to Title VII," Br. for U.S. at 6—it would then be necessary to determine the circumstances under which gender-conscious, as distinguished from race-conscious, affirmative action is permitted.

This Court has not yet confronted that question. And it is not at all clear that the limitations on affirmative action that the Court has developed with respect to race-conscious measures—limitations that reflect at least a plurality's view that any form of racial classification must satisfy the "compelling interest" standard, *see Wygant v. Jackson Board of Education*, —— U.S. ——, 54 L.W. 4479, 4481 (May 19, 1986) (plurality opinion); *id.* at 4484 (O'Connor, J., concurring); *see also id.* at 4487 (White, J., concurring)—are equally applicable to the gender area, in which the Court has not heretofore applied a compelling interest test, *see, e.g., Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982). *See also University of California Regents v. Bakke*, 438 U.S. 265, 302-03 (Powell, J.) ("Gender-based distinctions are less likely to create the analytical and practical problems present in preferential programs premised on racial or ethnic criteria").

The Solicitor General argues that "the strictest level of scrutiny" is applicable here because "Congress decided in Title VII to extend the same protection from discrimination based on race to discrimi-

In sum, there is no basis for interpreting Title VII to impose different prohibitions on public employers than on private employers. Nor is there any basis for concluding that Title VII's unitary set of prohibitions necessarily go as far as the Fourteenth Amendment's prohibitions. Thus, Petitioner's original position in this case is the correct one: *Weber* "set[s] forth the standard for voluntary affirmative action" that is controlling here. We therefore turn to a review of the *Weber* decision.

In so doing, we find ourselves in disagreement not only with the Petitioner and the Solicitor General, but with the Respondent Santa Clara County as well. Petitioner seemingly understands *Weber* to hold that affirmative action is lawful under Title VII only if designed to remedy "past discrimination" by the employer. Pet. Br. at 43. The Solicitor General views *Weber* as "pointing in two directions" and relies on other cases—none of which involves voluntary affirmative action under Title VII—to "resolve this ambiguity" in favor of the interpretation pressed by Petitioner. Br. for U.S. at 13. And Respondent Santa Clara County also finds *Weber* indeterminate as to "the showing required by an employer to justify affirmative action," Br. for Resp. Santa Clara at 13, and the County also turns to other cases, principally *Wygant*, *supra*, for guidance.

In our view, however, it could not be clearer that, as a matter of statutory interpretation, *Weber* states a set of rules that grants employers a wider leeway in framing and applying affirmative action plans than the rules

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nation based on sex." Br. for U.S. at 10 n.5. Thus the premise of the Solicitor General's attempt to read constitutional limitations into Title VII is that Congress' will must be bent in order to avoid supposed constitutional difficulties. And given that justification, there surely is no basis for extending the prohibitions of Title VII beyond the point where those prohibitions otherwise would reach unless the Constitution so requires.

Thus, if the theory of statutory construction that the Solicitor General urges here were accepted, there would be no avoiding the separate and unsettled constitutional issue posed by gender-based affirmative action.

the Court developed in *Wygant* for assessing the constitutionality of race-based affirmative action plans. To demonstrate that point requires a detailed discussion of both the facts and the reasoning of *Weber*.

B. *Weber* involved an affirmative action plan that was established by virtue of a national collective bargaining agreement between Kaiser Aluminum & Chemical Corp. ("Kaiser") and the United Steelworkers of America covering Kaiser's fifteen plants that were organized by that Union. Under that collective agreement, it was the goal at each plant to achieve "minority" representation (as that word is defined by the EEOC) in craft jobs equal to the percentage of minorities in the labor pool from which the plant hired its employees. To achieve that goal, the agreement obligated Kaiser to create an apprenticeship program to train its production workers to become craftsmen, and to fill those apprenticeships on a seniority basis with the proviso that "not less than one minority employee will enter [the apprenticeship program] for every non-minority employee entering until the goal is reached." *Weber v. Kaiser Aluminum & Chemical Corp.*, 563 F.2d 216, 222 (5th Cir. 1977) (quoting collective agreement).

The *Weber* case arose out of the implementation of this national agreement at Kaiser's Gramercy, Louisiana plant. Prior to implementation, craft vacancies at Gramercy had been filled by hiring already-trained craftsmen (with five years' experience in an industrial setting) off the street; the record in *Weber* indicated that Kaiser had followed that hiring policy because training a production worker to become a skilled craftsman would have cost approximately $15,000 to $20,000 per trainee. Joint Appendix in No. 78-432 at 67-68. "Because blacks had long been excluded from craft unions, few were able to present such credentials. As a consequence, prior to 1974 only 1.83% (5 of 273) of the skilled craftworkers at the Gramercy plant were black, even though the workforce in the Gramercy area was approximately 39% black." *Weber*, 443 U.S. at 198.

When Kaiser implemented the national agreement at the Gramercy plant, the necessary consequence was that some more senior nonminority applicants for the apprenticeship program were denied entry in favor of less senior minority applicants. Brian Weber, an unsuccessful white male applicant, brought suit alleging that the affirmative action plan constituted discrimination on the basis of race in violation of Title VII. Weber prevailed in the lower courts but not in this Court.

In finding a Title VII violation the Fifth Circuit reasoned that the fact that Kaiser employed four black craft workers "reflects the general lack of skills among available blacks but does not reflect any unlawful practice by Kaiser," and that, "in the absence of prior discrimination" by Kaiser, its voluntary affirmative action plan was unlawful. 563 F.2d at 224 & n.13. The Court of Appeals rejected Kaiser's claim that the Company was permitted "to correct a lack of training blamed on past *societal discrimination*," stating "[i]t is appropriate to draw the line for application of restorative justice at the Gramercy plant, rather than at a larger universe of . . . society at large." *Id.* at 225-26 (emphasis in original).

This Court stated the resulting "question for decision" as follows: "whether Congress in Title VII . . . left employers and unions . . . free to eliminate manifest racial imbalance in traditionally segregated job categories." 443 U.S. at 197. And the Court concluded for two principal reasons that "Title VII does not prohibit such race-conscious affirmative action plans." *Id.*

The Court first determined that interpreting Title VII to preclude affirmative action in such circumstances "would bring about an end completely at variance with the purpose of the statute.' " *Id.* at 202. The point of the Act, the Court explained, was to address " 'the plight of the Negro in our economy,' " and to facilitate "the integration of blacks into the mainstream of American society" by "open[ing] employment opportunities for Ne-

groes in occupations which have been traditionally closed to them." *Id.* at 202-203, quoting 110 Cong. Rec. 6548 (1964) (remarks of Sen. Humphrey). The Court concluded that given those aims

> [i]t would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had "been excluded from the American dream for so long," 110 Cong. Rec. 6552 (1964) (remarks of Sen. Humphrey), constituted the first prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy. [*Id.* at 204.]

The Court buttressed this conclusion with a second line of reasoning. One of the principles that animates Title VII, said the Court, is that " 'management prerogatives, and union freedoms . . . be left undisturbed to the greatest extent possible.' " *Id.* at 206, *quoting* H.R. Rep. No. 914, 88th Cong., 1st Sess., pt.2, p.29 (1963). Indeed, it was necessary for the authors of Title VII to adhere to that principle in order to attract the support of traditional conservatives, whose "support was crucial" to overcome the filibuster by Southern Democrats and to secure "passage of the bill." *Firefighters*, *supra*, 54 L.W. at 5010. Thus,

> [t]he conclusion in *Weber* that "Congress chose not to forbid all voluntary race-conscious affirmative action" when it enacted Title VII was largely based upon the legislative history which shows that Congress was particularly concerned to avoid undue federal interference with managerial discretion. . . . As one commentator points out, rather than seeking to outlaw voluntary affirmative action, the more conservative proponents of Title VII who held the balance of power, "were far more concerned to avoid the intrusion into business autonomy that a rigid color-blind standard would entail." [*Id.*] [3]

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[3] In this regard, the *Weber* Court attached considerable significance to the wording of § 703(j) which provides that nothing in Title VII "shall be interpreted to *require* any employer . . . to

The *Weber* Court declined to "define in detail the line of demarcation between permissible and impermissible affirmative action plans" under Title VII, as the Court concluded that the Kaiser plan unmistakably "falls on the permissible side of the line." 443 U.S. at 208. In this regard, the Court noted:

> The purposes of the plan mirror those of the statute. Both were designed to break down old patterns of racial segregation and hierarchy. Both were structured to "open employment opportunities for Negroes in occupations which have been traditionally closed to them." [*Id.*] [4]

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grant preferential treatment . . . to any group . . . on account of an imbalance which may exist" in the employer's workforce, 42 U.S.C. § 2000e-2(j). *Weber* notes that opponents of Title VII had attacked the legislation on the ground that the bill would require *or would permit* actions to redress imbalance, yet "Congress added § 703(j) which addresses only the first objection." 443 U.S. at 205. The Court also emphasized Representative MacGregor's remarks shortly before the final vote on Title VII:

> Important as the scope and extent of this bill is, it is also vitally important that all Americans understand what this bill does not cover . . . People complain about racial "balancing" in the public schools . . . about preferential treatment or quotas in employment. When we drafted this bill we excluded these issues largely because the problems raised by these issues are more properly handled at a governmental level closer to the American people and by communities and individuals themselves. [443 U.S. at 207-08 n.7 quoting 110 Cong. Rec. 15893 (1964).]

Representative MacGregor was not the only legislator to analogize the quota issue to the racial balancing in schools issue, *see, e.g.*, 110 Cong. Rec. 7789 (Sen. Scott), 9881 (Sen. Allott), 10009 (Sen. Bayh), 14313-14 (Sen. Miller); an issue on which Congress indisputably chose not to legislate, *see, e.g., id.* at 1518 (Rep. Celler), 5266 (Sen. Keating), 6820 (Sen. Douglas), 6841 (Sen. Cooper). Nor is the MacGregor statement the only one affirming that the quota issue fell outside the ambit of the bill. *See, e.g., id.* 6565-66 (statement of House Republican sponsors) (Title VII does not "require, reward or encourage the imposition of racial quotas or preferences" and "does not permit the ordering of racial quotas.").

[4] The Court also noted that the Kaiser plan "does not unnecessarily trammel the interests of the white employees" and "is a

And the Court in *Weber* stated its ultimate conclusion as follows:

> We conclude, therefore, that the adoption of the Kaiser- [Steelworkers] plan for the Gramercy plant falls within the area of discretion left by Title VII . . . to adopt affirmative action plans designed to eliminate conspicuous racial imbalance in traditionally segregated job categories. [*Id.* at 209]

In two final footnotes, the Court made reference to the argument advanced by Kaiser and by the United States that the "plan was justified because [Kaiser] feared that black employees would bring suit if [Kaiser] did not adopt an affirmative action plan." *Id.* at 209, n. 9. The Court stated that its opinion should "not [be read] to suggest that the freedom of an employer to undertake race-conscious affirmative action efforts depends on whether or not his effort is motivated by fear of liability under Title VII." *Id.* at 208, n. 8. Rather, the Court reserved decision on whether such "fear of liability" would provide a narrower alternative justification for engaging in affirmative action. *See id.* at 209, n.9.

In a concurring opinion, Justice Blackmun underscored the Court's refusal to adopt the "fear of liability" theory. Justice Blackmun stated that his "preference would be to resolve this litigation by applying" the "'arguable violation' theory" under which "employers and unions who had committed 'arguable violations' of Title VII [w]ould be free to make reasonable responses without fear of liability." 443 U.S. at 211 (Blackmun, J., concurring). Justice Blackmun noted that "[t]he Court . . . declines to consider the narrow 'arguable violation' approach and adheres instead to an interpretation of Title VII that permits affirmative action by an employer whenever the job category in question is 'traditionally segregated'" because of "a societal history of purposeful exclusion of blacks from the job category."

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temporary measure." 443 U.S. at 208. We address the significance of these observations for this case in Part II, *infra*.

Id. at 212 (Blackmun, J., concurring). The Court's interpretation of the statute, Justice Blackmun observed, "sweep[s] far more broadly than the class of arguable violations" in several respects:

> For example, Title VII provides no remedy for pre-Act discrimination, yet the purposeful discrimination that creates a "traditionally segregated job category" may have entirely predated the Act. More subtly, in assessing a *prima facie* case of Title VII liability, the composition of the employer's work force is compared to the composition of the pool of workers who meet valid job qualifications. When a 'job category' is traditionally segregated, however, that pool will reflect the effects of segregation, and the Court's approach goes further and permits a comparison with the composition of the labor force as a whole . . . [*Id.* at 212-13.]

Justice Blackmun ultimately joined the Court, reasoning that "where Title VII provides no remedy for blacks, it should not be construed to foreclose private affirmative action from supplying relief." *Id.* at 214.

C. *Weber* teaches two basic lessons as to the circumstances in which Title VII permits some form of affirmative action.

(1) The first and clearest lesson is a negative one: Title VII does *not* limit affirmative action to situations where there is "a history of past discrimination in which the employer has participated," Br. for the U.S. at 15, *see also* Pet. Br. at 43, or "evidence that would constitute a *prima facie* showing of a Title VII violation," Resp. Santa Clara County Br. at 18.

(a) To begin with, the Court's reasoning in *Weber* does not turn on "a history of past discrimination" by the defendant employer. Consistent with the view, expressed by many Members of this Court, that, "[i]n order to get beyond racism we must first take account of race." [5] the *Weber* Court concluded, in essence, that a

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[5] *Bakke*, 438 U.S. at 407 (opinion of Blackmun, J.); *see also, e.g., Fullilove v. Klutznick*, 448 U.S. 448, 516 (1980) (Powell, J., concur-

program to train blacks to become craftsmen—training which blacks were denied for so long—furthers the aims of Title VII and is lawful without regard to whether the particular employer who now provides the training was responsible for that past denial. Indeed, the premise of *Weber*—and the precise area of disagreement between this Court and the Fifth Circuit, *see* pp. 7-12, *supra*—is that the defendants in that case were *not* responsible for the past exclusion of blacks from the crafts, yet still were free to adopt their affirmative action program to ameliorate the continuing effect of that exclusion.

That premise reflects the record in *Weber*. As the Court of Appeals there noted, "[t]he district court found and appellants [Kaiser and the Steelworkers] all but concede[] that Kaiser has not been guilty of any discriminatory hiring or promotion at its Gramercy plant." 563 F.2d at 224.[6] And as that court also observed, the paucity of black craftsmen in the Gramercy area, and the resulting small percentage of black craftsmen in the Kaiser plant, "reflects the general lack of skills among available blacks but does not reflect any unlawful practices by Kaiser." *Id.* at 224 n. 13. Given these findings, and given this Court's reasoning in *Weber*, that decision cannot be read to require proof of past discrimination before an employer may embark on voluntary affirmative action.[6]

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ring) ("In our quest to achieve a society free from racial classification, we cannot ignore the claims of those who still suffer from the effects of identifiable discrimination"); *Wygant*, 54 L.W. at 4494 (Stevens, J., dissenting).

[6] To be sure, "the rule governing relief ordered by a court in a Title VII action" is that affirmative action is permitted only "to correct prior discrimination by the employer." Br. for U.S. at 15. But a court cannot order relief of *any* kind in a Title VII action absent a finding of a violation of the Act; this general rule of remediation is expressly codified in § 706(g), 42 U.S.C. § 2000e-5(g) ("If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may . . .) Thus, if the limitations on the courts were imposed on voluntary action as well,

(b) Nor can *Weber* fairly be read to hold that proof of an *arguable* Title VII violation is necessary to enable an affirmative action plan to avoid condemnation under Title VII as Respondent Santa Clara County seems to believe. While Justice Blackmun, in his concurring opinion in *Weber*, expressed a willingness to adopt that theory, the Court in *Weber* declined to do so. P. 11-12, *supra*. The Court instead sustained the Kaiser plan because that plan furthered the aims of the statute by opening opportunities previously closed to women and minorities, and not because the plan was a method of safeguarding against potential Title VII liabilities.[7]

Furthermore, in *Weber*, any showing of an "arguable" or *prima facie* Title VII violation required proof of a significant disproportion between the percentage of black craftsmen in the Gramercy area and the percentage of black craftsmen employed by Kaiser. As this Court has explained, where "special qualifications are required to fill particular jobs," statistical evidence, to be probative, must be limited to "individuals who possess the necessary qualifications." *Hazelwood School District v.*

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no such action would be permitted absent antecedent *findings of wrongdoing*. Not even the Solicitor General is prepared to go that far.

For this and other reasons, an essential point of *Weber* and of last Term's decision in *Firefighters* is to underscore the difference, for Title VII purposes, between compelled and voluntary affirmative action. As the Court concluded in *Firefighters*:

> [W]hatever the extent of the limits § 706(g) places on the power of the federal courts to compel employers and unions to take certain actions that the employers or unions oppose and would not otherwise take, § 706(g) does not restrict the ability of employers or unions to enter into voluntary agreements providing for race-conscious remedial action. [54 L.W. at 5010.]

[7] Indeed an employer's voluntary affirmative action plan is most unlikely to "resol[ve] charges of discrimination," Br. for the U.S. at 22, unless the program fortuitously reaches *all of the actual* victims of the employer's discrimination, and unless the employer also provides make-whole relief to those victims.

United States, 433 U.S. 299, 308 n.13 (1977). Yet no such evidence was offered in *Weber*; indeed, as noted, it was all but conceded that there were as few black craftsmen in the Gramercy area as in the Kaiser plant. Thus, the record in *Weber* plainly did not contain "a strong basis in evidence" for believing that Kaiser was guilty of past discrimination, *Wygant*, 54 L.W. at 4482 (plurality opinion).

(c) We recognize, of course, that in light of the lessons we contend are compelled by *Weber*, there will be circumstances, at least with respect to race-conscious affirmative action, *see* n. 2, *supra*, in which Title VII will not proscribe conduct which the Fourteenth Amendment (as interpreted in *Wygant*) would condemn if engaged in by a state actor. There is nothing anomalous or unsettling about that conclusion.

In *Wygant*—as we understand the opinions in that case—the Court determined "that a governmental agency's interest in remedying 'societal' discrimination, that is discrimination not traceable to its own actions, cannot be deemed sufficiently compelling to pass constitutional muster under strict scrutiny." 54 L.W. at 4485 (O'Connor, J., concurring); *see id.* at 4481 (plurality opinion); see also *id.* at 4487 (White, J., concurring). But the question whether an affirmative action plan is supported by a "compelling interest" simply is not relevant in determining whether that plan violates Title VII; in the latter situation, the sole question for decision is how far Congress intended the Act to reach. And what *Weber* teaches is that in enacting rules initially designed to govern only private employers and later extended to apply to public employers as well, Congress was concerned with limiting the degree of federal intrusion into managerial decisions and did not go so far as to outlaw every affirmative action program which, if engaged in by a public employer on a race-conscious basis, would fail the "compelling interest" test.[8]

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[8] Of course, the Court has not yet determined whether redressing societal discrimination is a sufficiently important governmental inter-

(2) There remains the task of identifying what is required by way of justification for an affirmative action plan to meet Title VII's requirements. As to this question, *Weber* again is instructive.

In framing the "question for decision" in *Weber*, the Court placed a limit on the scope of its inquiry by asking whether employers are "free to eliminate *manifest racial imbalance in traditionally segregated job categories.*" 443 U.S. at 197 (emphasis added). Similarly, in explaining why the Kaiser plan "falls on the permissible side of the line," the Court stressed that the plan was "designed to break down *old patterns of racial segregation and hierarchy.*" *Id.* at 208 (emphasis added). And in the final sentence of its opinion, the Court stated its "conclu[sion] as follows: the Kaiser plan "falls within the discretion left by Title VII to adopt affirmative action plans *designed to eliminate conspicuous racial imbalance in traditionally segregated job categories.*" *Id.* at 209 (emphasis added).

Plainly, then, *Weber* provides only that under Title VII, affirmative action to redress "conspicuous imbalance" that has "traditionally" existed is lawful. Title VII, the Court was at pains to add, does "not allow establishment of systems 'to *maintain* racial balance in employment.'" 443 U.S. at 207, n. 7 (emphasis added by Court). *See also Sheet Metal Workers*, 54 L.W. at 4999 (plurality opinion); *id.* at 5001 (Powell, J., concurring); *id.* at 5004 (O'Connor, J., dissenting). Thus, affirmative action violates Title VII if designed merely to restore a previously-achieved balance, to correct a short-term

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est to satisfy the lesser burden of justification generally required for gender-based classifications. *See* n.2, *supra*. Thus, it may well be that the Constitution permits gender-based affirmative action to remedy societal discrimination and that a decision in this case that Title VII permits such affirmative action will be determinative of whether the plan at issue here is lawful. In any event, the decision here is important in that further elaboration of *Weber* will apply to *private* employers as well who are not subject to constitutional constraints. *See* 443 U.S. at 200.

imbalance, and *a fortiori*, where there is no imbalance to redress.[9]

What is less clear from *Weber* is whether proof of a "conspicuous" and "traditional" racial imbalance establishes a sufficient predicate to sustain some form of affirmative action under Title VII, or whether an additional showing is required. In *Weber* the Court traced the imbalance in Kaiser's craft workforce to what the Court viewed as the purposeful discriminatory exclusion of blacks from the crafts; the Court stated that "[j]udicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice." 443 U.S. at 198 n.1. Thus *Weber* could be read to limit the freedom to engage in affirmative action to instances in which the imbalance to be remedied is not only traditional but also attributable to identifiable actors who have committed identifiable acts of discrimination.

Although the matter is not entirely free from doubt, we submit that *Weber* should not be read to be so limited. The theory of that decision is that Congress left an "area of discretion" for voluntary affirmative action which is "designed to break down old patterns of racial segregation and hierarchy" and which therefore "mirrors[s]" the purposes of Title VII. It is not necessary that the particular culprits responsible for the "old pattern" be identified before a plan that seeks to address that pattern can be said to advance the statutory goals and thus fall within that "area of discretion." To the contrary, a plan that furthers "the integration of blacks [or women] into the mainstream of American society" by redressing an "old pattern" of imbalance furthers the

[9] The term "imbalance" must be understood in light of the facts of *Weber*. Kaiser's workforce was "imbalanced" in the sense that in an area of the country which was almost 40% black, Kaiser employed few black craftsmen. But as previously noted, Kaiser's craft workforce was *not* necessarily imbalanced in comparison to the craft workforce in the Gramercy area. *Weber* thus does not require imbalance in the latter sense as a precondition for affirmative action.

purposes of the Act, whether or not the causes of the present situation can be neatly identified.

Moreover, requiring that the past wrongdoers be identified as a prerequisite to validating affirmative action under Title VII runs contrary to other important principles that lie at the heart of the Act. Title VII imposes responsibility for employment discrimination as of the effective date of the Act or, as of the start of the limitations period in a particular case, whichever is later. A discriminatory act predating that date is "merely an unfortunate event in history which has no present legal consequences." *Evans v. United Air Lines*, 431 U.S. 553, 558 (1977). Thus, judges and lawyers are not required by Title VII to delve into the past and attempt to allocate responsibility for "ignominous page[s] in this country's history," *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975); such questions (which in any event are not easy to resolve through the litigation process) remain the province of historians and sociologists, and not jurists. Yet if *Weber* were read to require proof of past discrimination by an identifiable actor before affirmative action is deemed lawful, an employer wishing to eliminate a long-standing imbalance in its workforce would first have to trace the cause of that "traditional" imbalance back to its origins and, if the employer's affirmative action plan were challenged, the employer then would have to prove to the satisfaction of the court the historic guilt of some third party or parties.

In sum, *Weber* is best read to hold that at least some forms of affirmative action aimed at redressing a conspicuous and long-standing exclusion of blacks or women from a particular job category are lawful under Title VII.

D. Measured against this test, there is no doubt that a sufficient predicate has been established in the instant case to permit some form of affirmative action by Respondents Santa Clara County and the Union. The record shows that as of 1973, when the County's Transporta-

tion Agency first developed an affirmative action plan, *see* J.A. 37, only 8% of the Agency's employees were female, *id.* 45, far short of the representation of women in the area workforce (36.4%), *id.* Using categories developed by the EEOC for grouping jobs, *id.* 47, 49, 125-26, the Agency did a workforce analysis which showed that as of 1978 no women had yet succeeded in securing a "skilled craft" job, and few women had secured technical or professional jobs, J.A. 49. Accordingly, the Agency's affirmative action plan, to which the Union agreed, *see* Br. of Resp. SEIU Local 715 at 27-28, provided that:

> [A] priority objective of the Agency EEO Affirmative Action Plan will be to provide women the maximum possible opportunity to obtain equitable employment and career progression in the Agency's professional, technical and skilled job classifications *where women have not been traditionally employed and where they are presently underrepresented.* [J.A. 34; emphasis added].

See also id. at 51. No more is required to establish a proper predicate for some proper form of affirmative action under Title VII.

II. THE MEANS USED TO ACHIEVE AFFIRMATIVE ACTION

Title VII limits not only the ends which may be pursued through affirmative action, but also the means chosen to pursue such ends. *Weber* states two such limits: an affirmative action plan must not "unnecessarily trammel the interests of [nonminority] employees" and it must be a "temporary measure." 443 U.S. at 208.[10] Petitioner,

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[10] It is not entirely clear whether "temporariness" is an independent requirement for an affirmative action plan under *Weber*, or whether the Court's reference to the fact that the Kaiser plan was "temporary" was simply another way of stating that Kaiser was *not* seeking to *maintain* racial balance. If the latter is the correct reading of *Weber*, then the application of the affirmative action plan in this case to redress a gross imbalance would be lawful without regard to Respondent Santa Clara County's intent on how the County would proceed once the imbalance was redressed.

supported by the Solicitor General, suggests that the plan agreed to by the County's Transportation Agency and the Union runs afoul of both of these principles; as we proceed to show, the supporting arguments advanced cannot withstand analysis.

A. The "Trammeling" Issue

(1) In explaining its conclusion that the affirmative action plan in *Weber* did not "unnecessarily trammel the interests of the white employees," the Court stated:

> The plan does not require the discharge of white workers and their replacement with new black hirees. Nor does the plan create an absolute bar to the advancement of white employees; half of those trained in the program will be white. [443 U.S. at 208].

Precisely the same is true here.

The affirmative action plan here does not compel the discharge or layoff of any nonminority employee; indeed the plan expressly recognizes that it will be "difficult to attain the Agency's employment goals," because, *inter alia*, the employee "turnover rate . . . is very low, greatly *limiting the opportunities available to hire minorities* [*and*] *women* . . . in the job classifications where they are most under represented." J.A. 55-56 (emphasis added). Nor does the plan "create an absolute bar to the advancement of nonminority employees"; the plan does not set aside any positions for minorities or females and the plan expressly provides that any annual goals that are established "should not be construed as 'quotas' that must be met" but rather are to "be seen as realistic desired levels of achievement." J.A. 64.

Indeed, in this regard, the instant case is a far easier one than *Weber*. Kaiser's affirmative action plan was far more rigid and had a far greater adverse " 'effect . . . upon innocent third parties,' " *Sheet Metal Workers*, 54 L.W. at 5001 (Powell, J., concurring), than does the plan in the instant case. Under Kaiser's plan, a quota was established: nonminorities could not compete for 50% of all apprenticeship vacancies.[11] In contrast, the

affirmative action plan here, like the Harvard admissions plan discussed in *Bakke*, provides that gender "may be deemed a 'plus' in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available [vacancy]." 438 U.S. at 317 (opinion of Powell, J.). While gender, like any other factor, may be determinative in a particular case, that will occur only where, as was true here, management concludes that the alternative candidates for a job are both competent and possess comparable qualifications.

There is a further, and related respect, in which the affirmative action plan at issue here has a less pronounced impact on nonminorities than the plan at issue in *Weber*. Under the prevailing personnel practices, in filling vacancies, management is free to choose whichever of the seven top-ranked applicants management decides will best further the County Transportation Agency's mission. Accordingly, no employee has any entitlement, or any expectation based upon law or contract, to a particular opening. *Cf.*, *Bishop v. Wood*, 426 U.S. 341 (1976). Thus, considering gender as a "plus" factor in making employment decisions cannot "disrupt . . . settled seniority expectations." *Wygant*, 54 L.W. at 4483 (plurality opinion). In contrast, in *Weber*, the affirmative action plan was superimposed upon a seniority-based selection process, albeit with respect to a newly-created apprenticeship program, and therefore the Kaiser plan was more disruptive of security-based expectations.

(2) In arguing to the contrary, Petitioner and the Solicitor General stress two points: the "burden" of the affirmative action plan in this instance, it is said, is focused on one individual, Petitioner Johnson, *see* Pet.

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[11] Petitioner here is wrong in suggesting that in *Weber*, nonminorities were guaranteed 50% of all apprenticeships. *See* Pet. Br. at 43. The Kaiser affirmative action plan provided that *"not less than"* 50% of apprenticeships would go to minorities, and required the application of seniority principles except where necessary to meet the 50% ratio.

Br. at 33-34, Br. for U.S. at 28-29; and, it is added, Petitioner has been denied a promotion rather than an entry-level job, *see* Pet. App. Br. 36; Br. for U.S. at 28-29. Neither point serves to distinguish *Weber* and neither provides a sound basis in principle to overturn the affirmative action plan in this case.

(a) Although management was legally free to select any of the top seven applicants for the road dispatcher job, it is reasonably clear that Petitioner and Diane Joyce, the successful (female) applicant, were the two finalists, and that the job would have gone to Petitioner had it not gone to Ms. Joyce. But whenever an affirmative action program is applied to a particular opening that is being filled through a selection process that compares the qualifications of applicants—be it an entry-level position for which persons off-the-street have applied or an opportunity for advancement which incumbent employees are seeking—the selection of a black or female pursuant to that program will necessarily disadvantage the identifiable nonminority applicant who otherwise would have been selected. That was true in *Weber*, itself; Brian Weber lost out on an apprenticeship position to a black with less seniority than Weber. Yet the *Weber* Court did not view that fact as one that invalidated the affirmative action plan there.

Indeed, the only way to completely avoid disadvantaging identifiable individuals in the pursuit of affirmative action would be to create rigid quota systems in which certain positions are reserved for blacks or women and for which no others may apply. Such an approach would, of course, assure that affirmative action has an equal adverse effect on all nonminority applicants as a group rather than an effect felt by one of those applicants in particular. But it would be most ironic if the rule against "unnecessarily trammeling the interests" of nonminorities were to require employers who desire to adopt an affirmative action plan to provide for a rigid quota system thereby precluding the adoption of plans

providing that race or gender is a "plus factor" in a decision-making process in which nonminority applicants are not foreclosed from consideration for any available position.

This is not to deny the relevance of the "diffuseness of the burden impose[d] on innocent nonminorities," *Sheet Metal Workers*, 54 L.W. at 5002 n.3 (Powell, J., concurring), in assessing the lawfulness under Title VII of a particular affirmative action plan. Our point is rather that the "diffuseness" inquiry cannot end with a determination that in the end the affirmative action disadvantages an identifiable individual, lest employers be pushed into adopting needlessly rigid plans.

In this regard we note that what sets apart the plan struck down in *Wygant* (on Fourteenth Amendment grounds) from the plan at issue here is not that identifiable nonminorities were adversely affected but the nature of that effect. Notwithstanding their seniority rights, these nonminorities were subject to the *indefinite loss of their jobs*. The *Wygant* plurality explained:

> In cases involving valid *hiring* goals, the burden to be borne by innocent individuals is diffused to a considerable extent among society generally. *Though hiring goals may burden some innocent individuals, they simply do not impose the same kind of injury that layoffs impose. Denial of a future employment opportunity is not as intrusive as loss of an existing job* [54 L.W. at 4484; emphasis added].

The *Wygant* plurality also noted that " 'the rights and expectations surrounding seniority make up what is probably the most valuable capital asset that the worker "owns," ' " and therefore "[*l*]*ayoffs disrupt these settled expectations in a way that general hiring goals do not.*" *Id.* (emphasis added). The plurality concluded:

> While hiring goals impose a diffuse burden, often foreclosing any one of several opportunities, layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious

> disruption of their lives. That burden is too intrusive. [*Id.*]

Thus in concluding in *Wygant* that the "burden" placed on "particular individuals" by layoff quotas is "too intrusive," the plurality placed great weight on the "kind of injury that layoffs"—as distinguished from non-hiring decisions—impose. And while we do not doubt that the lesson taught by *Wygant* with regard to the type of affirmative action plans that are permissible under the Constitution applies as well to Title VII—Justice Powell's opinion in *Sheet Metal Workers* makes that much clear—that lesson is not implicated here for the reasons previously explained.

(b) The County Transportation Agency-Union affirmative action plan likewise cannot be struck down here on the ground that the injury Petitioner suffered related to a promotional opportunity rather than an entry-level position. That was equally true in *Weber*, as that case involved apprenticeship positions which were to be filled from among those already working for Kaiser.

Moreover, it would be anomalous in the extreme to hold that an employer may engage in affirmative action in order to fill *entry-level* positions—positions which are typically the lowest paid, least desirable jobs in a workplace—but that thereafter affirmative action must end. Such a rule would fail to further one of *Weber's* critical aims: "to break down old patterns of racial segregation *and hierarchy*." 443 U.S. at 208 (emphasis added). And such a rule would delay, rather than hasten, the day when "no [employment] decision will be based upon immutable characteristics." *Fullilove*, 448 U.S. at 516 (Powell, J., concurring). Nothing recommends such a rule and nothing in this Court's precedents lends any support to such a rule.

(3) Petitioner, again supported by the Solicitor General, advances a further, broader critique of the affirmative action plan at issue here. Proceeding from the prem-

ise that a voluntary affirmative action plan is invalid under Title VII if the plan is not, in a court's view, "narrowly tailored to achieve its remedial objectives while at the same time intruding to the least extent practicable upon the expectations and interests of innocent third parties," Br. for U.S. at 17, Petitioner and the Solicitor General attack the plan here as overbroad in various of its particulars. *See* Pet. Br. at 38-42; Br. for U.S. at 25-26 & ns.14-17. This line of analysis is doubly flawed.

First, the premise of the analysis is unsound. *Weber* does not adopt any variant of the least-drastic-means approach that Petitioner champions. Indeed, it is doubtful that the *Weber* plan could have survived such an analysis. Who is to say that the 50% quota involved in *Weber* was necessary to "achieve its remedial objectives"? Surely, a lower quota—with a lesser impact on nonminorities—might in some sense have sufficed. Indeed, Kaiser arguably did enough by creating an apprenticeship program in lieu of hiring only already-trained craftsmen; if, as the lower courts in *Weber* had found, Kaiser had never discriminated in hiring, Kaiser could have filled its apprenticeships on a pure seniority basis and still eventually train a significant number of black craftsmen. Yet the *Weber* Court did not even discuss whether an apprenticeship program filled by seniority would have been "adequate" to achieve Kaiser's aims.

The reason that *Weber* did not engage in such analysis is plain from the opinion. The *Weber* Court relied in substantial measure on Congress' intent in enacting Title VII that " 'management prerogatives, and union freedoms . . . be left undisturbed to the greatest extent possible.' " *See* p. 9 *supra*. The rule that an affirmative action plan may not "unnecessarily trammel the interests" of nonminorities states an *outer* limit to a broad managerial discretion and is not intended to provide the basis for close judicial oversight of all details of the plan. Petitioner and the Solicitor General thus miss an essential

lesson of *Weber*. *Cf. Fullilove*, 448 U.S. at 508 (Powell, J., concurring) ("this Court has not required remedial plans to be limited to the least restrictive means of implementation").

Second, even assuming *arguendo* the validity of the type of analysis upon which Petitioner and the Solicitor General embark, both misconstrue the affirmative action plan at issue here. Reduced to its essentials, what that plan does is: first, adopt a "long-range goal" of attain[ing] a work force which includes in all occupational fields and at all employment levels, minorities, women, and handicapped persons in numbers consistent with the ratio of these groups in the area work force," J.A. 54, 31; second, provide for annual workforce analyses to ascertain where the County Transportation Agency stands in relation to the goal, *see* J.A. 61-64; and third, to the extent the long-term goal has not been met, establish "yearly employment goals for women, minorities and handicapped persons in each EEOC job category and major job classification" in which there is significant underrepresentation. J.A. 64.

The long-term goal the plan adopts is identical to the goal Kaiser adopted in *Weber* with respect to craft positions. The annual workforce review that is performed to determine whether there has been progress toward the goal is in keeping with the fundamental spirit of Title VII which is intended to act as a "spur or catalyst to cause 'employers and unions to self-examine and to self-evaluate their employment practices." *Weber*, 443 U.S. at 204, *quoting Albemarle Paper Co. v. Moody*, *supra*, 442 U.S. at 418. And finally, the adoption of annual goals and the concomitant consideration of race or gender as a "plus" factor where underrepresentation persists, is, as we already have seen, a modest form of affirmative action of the type *Weber* permits.

Thus, the attempts by Petitioner and the United States to portray the affirmative action plan as heavyhanded and excessive simply do not withstand analysis.

B. The "Temporariness" Issue

(1) In *Weber* the collective bargaining agreement between Kaiser and the Steelworkers provided for continuing affirmative action "until the goal [of proportional representation] is reached." P. 7 *supra*. The agreement did not state what would happen after that point or whether the goal would be deemed a continuing one, authorizing affirmative action should minority representation fall below "the goal." [12] Nonetheless, given the terms of the agreement, the Court assumed its temporariness:

> [T]he plan is a temporary measure; it is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance. Preferential selection of craft trainees at the Gramercy plant will end as soon as the percentage of black skilled craftsworkers in the Gramercy plant approximates the percentage of blacks in the local labor force. [443 U.S. at 208-09]

Cf., also, Fullilove, 448 U.S. at 513 (Powell, J., concurring) (minority set-aside temporary because the authorization measure of which the set-aside was a part was time-limited and thus "[i]t will be necessary for Congress to reexamine the need for a race-conscious remedy before it extends or reenacts (the set-aside])".

(2) The affirmative action plan in the instant case is temporary in precisely the same way as was the plan at issue in *Weber*. Although the plan here does not, in terms, contain a terminal date, it is framed in terms of achieving certain goals rather than maintaining fixed percentages. As the court below stated, "[i]mplicit in the plan

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[12] Kaiser's industrial Relations Manager at Gramercy testified that affirmative action would continue to assure that the goal continued to be met, *see* J.A. 69 in No. 78-432, but he was not a participant in the collective bargaining negotiations that had produced the affirmative action program, *id.* 64-66, 83-84, and before this Court the Steelworkers represented that it was that Union's understanding that the plan was temporary, Steelworkers Reply Br. in No. 78-432 at 5 & n.4.

is the intent to stop taking sex into account once the long-range percentage goals are attained." 748 F.2d at 1313. And the absence of an express termination provision is not fatal for the validity of an affirmative action plan should not "depend on technicalities in drafting." *Id.* at 1312.

The foregoing conclusion is buttressed by the general rule of construction, developed in contract cases but equally applicable here, that "ambiguously worded contracts should not be interpreted to render them illegal and unenforceable when the wording lends itself to a logically acceptable construction that renders them legal and enforceable." *Walsh v. Schlecht*, 429 U.S. 401, 408 (1977). Absent something in the affirmative action plan that precludes reading the plan as time-limited, such an intent should be implied so that the lawfulness of the plan is preserved.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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No. 85-1129

In The

Supreme Court of the United States

October Term, 1985

PAUL E. JOHNSON,

Petitioner,

v.

TRANSPORTATION AGENCY, SANTA CLARA COUNTY, CALIFORNIA and SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 715,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE STATE OF CALIFORNIA, THE CALIFORNIA FAIR EMPLOYMENT AND HOUSING COMMISSION, THE STATES OF IDAHO, LOUISIANA, MARYLAND, MICHIGAN, MINNESOTA, NEBRASKA, NEW YORK, OREGON, WISCONSIN, AND THE PENNSYLVANIA HUMAN RELATIONS COMMISSION AS AMICI CURIAE IN SUPPORT OF RESONDENTS

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INTEREST OF AMICI CURIAE

Amici respectfully submit this brief in support of respondents. Amici urge this Court to affirm the decision below and hold that a public employer may adopt a bona fide affirmative action plan to remedy a substantial underrepresentation of women in a traditionally segregated job classification without violating Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*

Amici have an interest both in preserving the right of public employers to take effective action to eliminate the impact of past discrimination on their work forces and in ensuring that federal and state laws forbidding employment discrimination are effectively enforced. Many of amici have themselves initiated voluntary affirmative action programs to eliminate discrimination and to remedy the effects of past discrimination.[1] All of Amici are responsible for enforcing state anti-discrimination statutes and thus have an interest in encouraging voluntary compliance as the primary means of ending discrimination violative of those statutes. Amici have a strong interest in preserving the authority to devise workable procedures to implement bona fide affirmative action plans, to end discrimination, to correct the underrepresentation of women and minority group members caused by past

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1. *See, e.g., Kirkland v. New York State Civil Service Commission*, 711 F.2d 1117 (2d Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984); *see also La Riviere v. Equal Employment Opportunity Commission*, 682 F.2d 1275 (9th Cir. 1982), approving a voluntary affirmative action program designed to end sex-based discrimination in hiring for the California Highway Patrol; *Local 526-M Michigan Corrections Organization, etc. v. State of Michigan*, 110 Mich. App. 546, 313 N.W.2d 143 (1981), rejecting a constitutional challenge to an affirmative action plan; and *United Building and Construction Trades Council v. Camden*, 88 N.J. 317, 443 A.2d 148 (1982), affirming state treasurer's approval of minority hiring goals.

discrimination, and to foster other governmental objectives.

The State of California and the California Fair Employment and Housing Commission, by John K. Van de Kamp, Attorney General of the State of California, and other Amici States by their Attorneys General, submit this brief pursuant to Supreme Court Rule 36.4. Amicus Pennsylvania Human Relations Commission files this brief with the consent of the parties pursuant to Supreme Court Rule 36.2.

SUMMARY OF ARGUMENT

Bona fide affirmative action plans containing sex and race-based hiring or promotional goals are lawful means for public and private employers to remedy and eliminate the effects of past unlawful discrimination. They also serve to foster important public interests, e.g., establishing a racially integrated police force in a city with a recent history of racial unrest. *See Baker v. City of Detroit,* 483 F.Supp. 919, 996-1000, *aff'd sub nom., Bratton v. City of Detroit,* 704 F.2d 878 (6th Cir. 1983), mod. 712 F.2d 222 (1983), *cert. denied,* 464 U.S. 1040, *reh. denied,* 465 U.S. 1074 (1984). Amici argue that a public agency may take sex into consideration in making a promotional decision pursuant to a voluntary affirmative action plan adopted to remedy a substantial underrepresentation of women in a traditionally sex-segregated job.

One of the major goals of Congress in enacting Title VII in 1964 and amending it in 1972 to apply to public employers, was to provide an effective means of remedying discriminatory practices. This Court has unequivocally stated that a private employer may adopt race-conscious affirmative remedies to eliminate the effects

of past discrimination in traditionally segregated job classifications and may voluntarily adopt a race-conscious affirmative action plan. *United Steelworkers of America, AFL-CIO-CLC v. Weber,* 443 U.S. 193 (1979). *Weber* applies with equal force to sex-based affirmative action by a public employer.

Once the Court confirms that voluntary affirmative action by a *public* employer is lawful under Title VII and under the equal protection guarantees of the Fifth and Fourteenth Amendments to the Constitution, the issues herein are what circumstances justify race or sex-conscious measures and what are the limits of a lawful affirmative action plan.

An affirmative action plan may be premised on significant underrepresentation of a protected class under Title VII in a traditionally segregated job classification—precisely the factual predicate for the employer's sex-based employment decision in this case. Such a showing can be based solely on evidence sufficient to establish a prima facie case of unlawful employment discrimination under Title VII pursuant to either the disparate treatment or the disparate impact theory. Adoption of such a justification will serve the important policies of protecting those who are disadvantaged by affirmative action programs and at the same time permitting public employers to adopt programs without admitting discrimination, and thus exposing themselves to potential liability.

Public employers need clear guidelines as to how to design voluntary affirmative action plans which are lawful under Title VII and the Constitution. Using the plan approved by the Court in *Weber* as a starting point, this Court should hold that a public employer affirmative action plan is lawful if: 1) it results or is designed to

result in hiring sufficient numbers of minority group or female applicants so that the employer's work force approximates the balance that would have been achieved absent past discrimination; 2) continues only so long as is necessary to achieve its legitimate goals; 3) does not result in hiring unqualified applicants; and 4) does not completely bar white or male applicants or unnecessarily infringe their interests.

ARGUMENT

I. TITLE VII PERMITS PUBLIC EMPLOYERS TO ADOPT AFFIRMATIVE ACTION PLANS TO REMEDY THE EFFECTS OF PAST DISCRIMINATION.

A. Voluntary Action by Employers is the Preferred Means of Achieving the Goals of Title VII.

This Court has repeatedly held that Congress intended that voluntary action by employers be the preferred means of achieving the objectives of Title VII. *Local Number 93, International Association of Firefighters, AFL-CIO-CLC v. City of Cleveland,* 106 S.Ct. 3063 (1986); *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 417-418 (1975); *Alexander v. Gardner-Denver Co.,* 415 U.S. 36, 44 (1974). Consistent with this principle, this Court has approved an affirmative action plan adopted voluntarily by a private employer and union which reserved fifty percent of the openings in a craft-training program for black employees. *United Steelworkers of America, AFL-CIO-CLC v. Weber,* 443 U.S. 193 (1979).

In *Weber,* this Court concluded, based on the legislative history, that voluntary affirmative action plans were not prohibited by Title VII because they were consistent with the remedial purposes of the Act:

> "Accordingly, it was clear to Congress that '[t]he crux of the problem [was] to open employment opportunities for Negroes in occupations which have been traditionally closed to them,' 110 Cong. Rec. 6548 (1964) (remarks of Sen. Humphrey), and it was to this problem that Title VII's prohibition against racial discrimination in employment was primarily addressed.
>
> "It plainly appears from the House Report accompanying the Civil Rights Act that Congress did not intend wholly to prohibit private and voluntary affirmative action efforts as one method of solving this problem." *Steelworkers v. Weber*, 443 U.S. at 203.

Accordingly, this Court held that Title VII permits private employers and unions to adopt reasonable race-conscious affirmative action plans.

The rationale of this Court's decision in *Steelworkers v. Weber* should apply with equal force both to voluntary affirmative action by public employers and to affirmative action intended to remedy sex-based discrimination.

B. Public Employers May Engage in Voluntary Affirmative Action.

With respect to public employers, this Court has not squarely addressed the legality of an affirmative action plan adopted voluntarily in furtherance of the purposes of Title VII.[2] However, the Court in *Firefighters v.*

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2. This Court's decision in *Wygant v. Jackson Board of Education*, 106 S.Ct. 1842 (1986) addressed the issue of public employer voluntary affirmative action in a factual setting which did not require consideration of what Title VII permits. In *Wygant*, the Court disapproved a collective bargaining agreement term which provided that if the school district laid off teachers the percentage of minority teachers must remain the same as existed before the layoffs. The effect was that less senior minority teachers were retained while more senior white teachers were laid off. The stated purpose of the preferential

(Continued on following page)

Cleveland decided a closely related issue; it held that a public employer may take voluntary action in the form of a consent decree which includes reasonable race-conscious relief that benefits individuals who are not actual victims of the employer's prior discrimination.[3] The Court noted, in dicta, that in some circumstances public employers may lawfully engage in the type of affirmative action approved in *Weber:*

> "In any event there may be instances in which a public employer, consistent with both the Fourteenth Amendment as interpreted in *Wygant* and § 703 as interpreted in *Weber*, could voluntarily agree to take race-conscious measures in pursuance of a legitimate remedial purpose." *Firefighters v. Cleveland*, at 106 S.Ct. at 3073, n. 8.

Congress has recognized and acted to remedy the particular problem of discrimination by public sector employers. In 1972, Congress amended Title VII to extend

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(Continued from previous page)

layoff provision was to retain sufficient minority teachers to serve as role models for minority students. In a plurality opinion, this Court held that the layoff plan was based on an irrelevant comparison between the percentage of minority teachers and the percentage of minority students in the district and that it was not adopted to remedy past discrimination in employment.

Applying the strict scrutiny test, the Court concluded that the plan was not narrowly tailored to achieve a compelling governmental interest because it imposed too great a burden on innocent non-minority employees. The Court cited its prior opinion in *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984) in support of its conclusion that layoffs based on race impose a heavier burden than race-based hiring goals.

3. The Court expressly noted that its decision was a narrow one limited to the question of whether § 706(g) of Title VII precluded the District Court from entering the challenged consent decree. *Firefighters v. Cleveland*, 106 S.Ct. 3063 (1986). The Court also noted that it did not "address the circumstances, if any, in which voluntary action by a public employer that is permissible under § 703 would nonetheless be barred by the Fourteenth Amendment." 106 S.Ct. at 3073, n. 8.

its prohibitions of unlawful discrimination to state and local governments and agencies. Equal Employment Opportunity Act of 1972, Pub. Law 92-261 (1972). In its report on the proposed amendment, the House of Representatives focused on the pervasiveness of employment discrimination practiced by public agencies:

> "In a report released in 1969, the U.S. Commission on Civil Rights examined equal employment opportunity in public employment in seven urban areas located throughout the country—North as well as South. The report's findings indicate that widespread discrimination against minorities exists in State and local government employment, and that the existence of this discrimination is perpetuated by the presence of both institutional and overt discriminatory practices. The report cites widespread perpetuation of past discriminatory practices through de facto segregated job ladders, invalid selection techniques, and stereotyped misconceptions by supervisors regarding minority group capabilities. The study also indicates that employment discrimination in State and local governments is more pervasive than in the private sector." H. Rep. No. 92-238, reprinted in 1972 U.S. Code Cong. and Admin. News, 2137 at 2152.

Given the pervasiveness of discrimination by public employers, voluntary compliance as a means of resolving discrimination complaints takes on added significance. As Congress stated in enacting the 1972 amendments:

> "Discrimination by government . . . serves a doubly destructive purpose. The exclusion of minorities from effective participation in the bureaucracy not only promotes ignorance of minority problems in that particular community, but also creates mistrust, alienation, and all too often hostility toward the entire process of government." S. Rep. No. 92-415 at 10. 92d Cong., 1st Sess. (1971).

In addition to their compelling interest in eliminating discrimination from their own work forces, public agencies

also have a compelling interest in setting an example for private employers by acting voluntarily to comply with the law. *Wygant v. Jackson Board of Education,* 106 S.Ct. 1842, O'Connor, J., concurring, at 1852 (1986).

Therefore, public employers require, at a minimum, parity with private employers in their ability to voluntarily adopt race and sex-based affirmative action plans consistent with the remedial purposes of Title VII.[4]

There is no constitutional impediment to extending the holding of *Weber* to public employers. This Court has approved the use of race-conscious action by public agencies to achieve compliance with the law in appropriate circumstances. *Fullilove v. Klutznick,* 448 U.S. 448 (1980) (minority business set-aside program); *Regents of the University of California v. Bakke,* 438 U.S. 265 (1978) (consideration of race as a factor in admission to medical school); *United Jewish Organization of Williamsburgh, Inc. v. Carey,* 430 U.S. 144, 165-166 (1977) reapportionment); and *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 15 (1971) (school desegregation). It has also approved sex-based preferences by public agencies. *Califano v. Webster,* 430 U.S. 313 (1976) (more favorable computation of old-age benefits); *Kahn v. Shevin,* 416 U.S. 351 (1974) (state property tax exemption granted to widows but not to widowers).

This case squarely presents the question of what circumstances will justify sex-conscious action by a public agency in an employment setting.

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4. Because public employers often have strong policy and constitutionally sound reasons for adopting affirmative action plans, we believe they may be entitled to greater latitude to employ such methods.

C. Title VII Permits Sex Based Affirmative Action Plans.

There is no question that the rationale of *Weber* permits sex-based affirmative action plans just as it expressly permitted consideration of race. This Court has already applied the same standards to consideration of claims of sex-based discrimination as to claims of race discrimination. *Dothard v. Rawlinson,* 433 U.S. 321 (1977) (applying *Griggs v. Duke Power Co.,* 401 U.S. 424 (1980), disparate impact theory to sex-based discrimination). Congress itself has noted the similarities between sexual discrimination and racial discrimination. In debates over the 1972 amendments to Title VII the Senate report stated that:

> " . . . discrimination against women is no less serious than other prohibited forms of discrimination, and . . . it to be accorded the same degree of concern given to any type of similarly unlawful conduct. As a further point, recent studies have shown that there is a close correlation between discrimination based on sex and racial discrimination, and that both possess similar characteristics. Both categories involve large, natural classes, membership in which is beyond the individual's control; both involve highly visible characteristics on which it has been easy to draw gross, stereotypical distinctions. The arguments justifying different treatment of the sexes were also historically used to justify different treatment of the races." S. Rep. No. 92-415 at 7-8, 92d Cong., 1st Sess. 7-8 (1971).

The Ninth Circuit addressed the application of *Weber* to sex-based affirmative action in *La Rivere v. Equal Employment Opportunity Commission,* 682 F.2d 1275 (9th Cir 1982):

> ". . . Title VII's gender component . . . was enacted primarily to protect women against discrimination in the market place and to open employment opportunities for women in occupations that had traditionally been closed to them. These purposes mirror those which underlie Title VII's prohibition of racial discrimination. Because the Court in *Weber* identified these purposes as manifesting a congressional intent not to prohibit voluntary affirmative action programs designed to correct racial imbalances in the work force, we must similarly conclude that Congress did not intend, when it added to Title VII the prohibition of gender-based employment discrimination, to prohibit voluntary affirmative action programs designed to correct longstanding sexual imbalances in the work force." (Citations omitted.) 682 F.2d at 1278-1279.

Other circuits have also approved sex-based decisions made pursuant to bona fide affirmative action plans. *Local Union No. 35 of International Brotherhood of Electrical Workers v. City of Hartford*, 625 F.2d 416 (2d Cir. 1980); *United States v. City of Alexandria*, 614 F.2d 1358 (5th Cir. 1980); *United States v. City of Jackson, Mississippi*, 519 F.2d 1147 (5th Cir. 1975).

II. GROSS UNDERREPRESENTATION OF MINORITY GROUP MEMBERS AND WOMEN IN TRADITIONALLY SEGREGATED JOB CLASSIFICATIONS JUSTIFIES VOLUNTARY AFFIRMATIVE ACTION BY A PUBLIC EMPLOYER.

This Court has recently described the factual predicate for adoption of race-conscious measures pursuant to court order. In *Local 28 of the Sheet Metal Workers' International Association v. Equal Employment Opportunity Commission*, 106 S.Ct. 3019 (1986), the Court noted the necessity for use of race-conscious measures to remedy longstanding discrimination:

> "In some instances, however, it may be necessary to require the employer or union to take affirmative steps to end discrimination effectively to enforce Title VII. Where an employer or union has engaged in particularly longstanding or egregious discrimination, an injunction simply reiterating Title VII's prohibition against discrimination will often prove useless and will only result in endless enforcement litigation. In such cases, requiring recalcitrant employers or unions to hire and to admit qualified minorities roughly in proportion to the number of qualified minorities in the work force may be the only effective way to ensure the full enjoyment of the rights protected by Title VII." 106 S.Ct. 3036.

Thus it is clear that particularly longstanding or egregious discrimination practiced by a particular employer or union suffices as a justification for race-conscious or sex-conscious remedial measures.

This Court has also indicated its approval of voluntary affirmative action plans adopted by a private employer to correct longstanding discrimination by other parties. The factual predicate for the plan in *Weber* is instructive in the instant case. Until 1974, the Kaiser Aluminum and Chemical Plant in Gramercy, Louisiana hired only persons who had prior craft experience to perform craft work at the plant. Because black workers had long been excluded from craft unions[5] few black applicants possessed the requisite

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5. The Court took judicial notice of the exclusion of black persons from craft unions because of their race. The court cited six federal court opinions and several books and articles in support of its finding. None of them related to discrimination by Kaiser at its Gramercy plant or by the United Steelworkers local which represented employees at the plant. 443 U.S. at 198, n. 1.

experience. Prior to 1974 only 1.83 percent (or five of 273) of the skilled craftworkers at the Gramercy plant were black although the work force in the plant was approximately 39 percent black.

In response to the gross underrepresentation of blacks, Kaiser commenced an in-plant training program for craft workers and reserved 50 percent of the positions for black craft trainees. The Court held that the race-conscious affirmative action plan was lawful under Title VII because it was adopted "to eliminate traditional patterns of racial segregation." 443 U.S. at 201. The Court did not require a judicial finding of discrimination by the company or the union nor did it find that either had discriminated in the past against black applicants for craft worker positions at the Gramercy plant. Instead it found the challenged plan lawful and justified solely by industry-wide discrimination and a statistical comparison between the percentage of black craft workers employed at the plant and the overall black labor pool in the area. According to the Court, private employers could voluntarily adopt "affirmative action plans designed to eliminate conspicuous racial imbalance in traditionally segregated job categories." 443 U.S. at 209.

The Ninth Circuit in the opinion below upheld the Santa Clara County Transportation Agency's voluntary affirmative action plan based on the same type of evidence of prior discrimination as in *Weber*. The court stated: "Like the *Weber* plan, the Agency affirmative action plan is a remedial effort intended to break down entrenched patterns of discrimination." *Johnson v. Transportation Agency, Santa Clara County*, 748 F.2d 1308, *mod.*, 770 F.2d 752, 757 (9th Cir. 1984). At the time of the challenged promo-

tional decision, all of the Agency's 237 skilled craft positions were filled by men and the affirmative action plan noted that women were also underrepresented in other job categories. This, the court concluded, was sufficient to justify voluntary affirmative action:

> "In order to demonstrate that its plan is remedial, an employer need not show its own history of purposeful discrimination. It is sufficient for the employer to show a conspicuous imbalance in its work force." 770 F.2d at 758 (citation omitted).

Just such a conspicuous imbalance, occurring in a traditionally race segregated job classification, was the justification for the affirmative action plan approved by the Court in *Weber*.

In addition to being segregated on the basis of race, skilled craft jobs have traditionally been and continue to be segregated by sex. The exclusion of women from such jobs is so extensive and so well documented that this Court may take judicial notice of that fact.[6]

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6. In effect, this is just what the Ninth Circuit did. It concluded:

> "Included in the skilled craft category are mechanics, body and fender repairers, construction inspectors, road maintenance workers, and road dispatchers. A plethora of proof is hardly necessary to show that women are generally underrepresented in such positions and that strong social pressures weigh against their participation." 770 F.2d at 758.

There have been many judicial findings of exclusion from crafts on the basis of sex. *E.g., Thompson v. Sawyer*, 678 F.2d 257 (D.C. Cir. 1982); *Local Union No. 35 of International Association of Electrical Workers v. City of Hartford*, 625 F.2d 416 (2d Cir. 1980); *Davis v. Richmond, Fredericksburg & Potomac Railway Co.*, 593 F. Supp. 271 (E.D. Va. 1984); *Bailey v. Southeastern Area Joint Apprenticeship Committee*, 561 F. Supp. 895 (N.D. Va. 1983). See United States Commission on Civil Rights, *A Growing Crisis—Disadvantaged Women and Their Children*, 17-24 (1983).

Nearly every Circuit Court which has reached the question has concluded, as did the Ninth Circuit below, that an employer need not prove that it has engaged in discrimination in employment in order to demonstrate that its voluntary affirmative action plan is consistent with the remedial purposes of Title VII. *Kromnick v. School District of Philadelphia*, 739 F.2d 894 (3d Cir. 1984), *cert. denied*, 105 S.Ct. 782 (1985); *Bushey v. New York State Civil Service Commission*, 733 F.2d 220 (2d Cir. 1984), *cert. denied*, 469 U.S. 1117, *reh. denied*, 105 S.Ct. 1384 (1985); *Bratton v. City of Detroit*, 704 F.2d 878 (6th Cir. 1983), *mod.*, 712 F.2d 222 (1983); *cert. denied*, 464 U.S. 1040, *reh. denied*, 465 U.S. 1074 (1984); *Warsocki v. City of Omaha*, 726 F.2d 1358 (1984); *Setser v. Novack Investment Company*, 657 F.2d 962 (8th Cir. 1981) (*en banc*), *cert. denied*, 454 U.S. 1064 (1981); *United States v. City of Miami*, 614 F.2d 1322, 1337-1338 (5th Cir. 1980).

The lone exception is the Seventh Circuit's decision in *Janowiak v. Corporate City of South Bend*, 750 F.2d 557 (7th Cir. 1984), in which the court held that evidence of a statistical disparity between the minority population of the city and the proportion of minorities employed in the police and fire departments did not justify a race-conscious affirmative action plan that created a minority and a non-minority hiring list for the fire department. In requiring evidence that the city itself had discriminated, the holding in *Janowiak* is inconsistent with that of this Court in *Weber*. *Weber* held that past discrimination[7] combined

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7. The discrimination of which the Court took judicial notice was discrimination by skilled craft unions in general and included no evidence of discrimination by the Steelworkers or by Kaiser.

with a present statistical disparity justifies race-conscious affirmative action without the need for proof of prior discrimination by the employer which adopts the affirmative action plan.

In her concurring opinion in *Wygant*, Justice O'Connor points out that requiring a public employer to make a finding that it engaged in discriminatory practices as a predicate to adopting race-conscious affirmative action measures would:

> "... clearly be at odds with this Court's and Congress' consistent emphasis on 'the value of voluntary efforts to further the objectives of the law.' The value of voluntary compliance is doubly important when it is a public employer that acts, both because of the example its voluntary assumption of responsibility sets and because the remediation of governmental discrimination is of unique importance. ... Imposing a contemporaneous findings requirement would produce the anomalous result that what private employers may voluntarily do to correct apparent violations of Title VII, public employers are constitutionally forbidden to do to correct their statutory and constitutional transgressions." 106 S.Ct. at 1855.

Forbidding public employers from voluntarily remedying past discrimination could not have been the intent of Congress when it amended Title VII in 1972 to apply with full force to public employers. The Congressional debates emphasized the pervasiveness of discrimination by public employers and the importance of eliminating such discrimination. Given this Congressional concern it is essential that public employers not be forbidden or even deterred from acting voluntarily to eliminate their own discriminatory practices.

As Justice O'Connor pointed out in *Wygant*, requiring public employers to admit prior discrimination would act as a disincentive to voluntary affirmative action:

> "[P]ublic employers are trapped between the competing hazards of liability to minorities if affirmative action *is not* taken to remedy apparent employment discrimination and liability to non-minorities if affirmative action *is* taken. Where these employers, who are presumably fully aware of their duty under federal law to respect the rights of *all* their employees and of their potential liability for failing to do so, act on the basis of information which gives them a sufficient basis for concluding that remedial action is necessary, a contemporaneous findings requirement should not be necessary. 106 S.Ct. 1855-1856 (concurrence).

Justice O'Connor's remarks recognize that the conflicting responsibilities that a public agency has to its minority constituents and to its non-minority constituents act as a constraint on the actions of such a body in taking affirmative action to end discrimination. A public agency, unlike a private employer, must of necessity balance these competing interests and in doing so not unduly infringe on the rights of either group.

One commentator has suggested that because public employers are politically responsible, courts should grant greater deference to their determinations of a need for affirmative action to redress past discrimination:

> "When, however, a political body institutes a public employment affirmative action program that disadvantages the majority of the persons within the political body's jurisdiction, and when the body is responsible to the public, or when it has received express authority to institute affirmative action from a politically responsible body, courts should give great deference to both the findings of prior discrimination

> and the remedial measures taken, at least when the findings supporting the program are of broad-based societal discrimination. Deference is appropriate for two reasons: First, courts should be wary of second-guessing legislative findings, especially broad-based findings, which legislatures are better suited than courts to make; second, when a political body is responsible to the majority, it seems responsible to presume that when it acts, it protects the interests of the majority." Note, *The Constitutionality of Affirmative Action in Public Employment: Judicial Deference to Certain Politically Responsible Bodies,* 67 Va. L. Rev. 1235 (1981).

Judicial deference in these circumstances would accommodate concerns expressed by the Court that affirmative action not unduly infringe the interests of non-minority workers and that employers be free to undertake affirmative action when it is necessary.

Public bodies such as Amici States and the County of Santa Clara are also politically responsive legislative bodies whose determinations regarding the necessity of affirmative action which may temporarily and incidentally disadvantage the majority of their constituents, should be accorded deference by the courts.

Public agencies must retain the freedom to adopt affirmative action plans in response to compelling governmental needs. For example, affirmative action in employment might be an appropriate means of redressing other types of civil rights violations. In *Bratton v. City of Detroit* the court considered the need to remedy the injury caused to a specific, identifiable segment of the population of Detroit as a direct result of the police department's egregious hiring discrimination. The record in that case established a pattern of mistreatment by

white officers of black citizens of Detroit. According to the court the affirmative action plan which aimed to remedy all the adverse effects of the department's prior practices was justified in part by consideration of the impact of that prior discrimination on the department's ability to supply effective law enforcement services. 704 F.2d at 996-1000.

This Court should act to dispel the confusion regarding the type of findings of discrimination which justifies affirmative action measures by public agencies by applying the *Weber* standard and holding that public employers may make the requisite showing by producing evidence of a present significant underrepresentation of a protected class under Title VII combined with evidence of traditional segregation of the affected job classification or societal discrimination which has contributed to the statistical disparity.

As a practical matter an employer can make the requisite showing based primarily on statistical evidence sufficient to establish a prima facie case of unlawful discrimination under Title VII. Under both the disparate impact and the disparate treatment theories under Title VII a plaintiff may establish a prima facie case of discrimination based solely on statistical evidence of racial or sexual imbalance. As the Court noted in *International Brotherhood of Teamsters v. United States,* 431 U.S. 324 (1977):

> "Statistics showing racial or ethnic imbalance are probative in a case such as this one only because such imbalance is often a telltale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the

> population in the community from which employees are hired. 431 U.S. at 340, n. 20.

Teamsters involved a claim of disparate treatment, but this Court has also held that a statistical disparity suffices to establish a prima facie case under a disparate impact theory, stating that "[w]here gross statistical disparities can be shown, they alone may . . . constitute prima facie proof of a pattern or practice of discrimination." *Hazelwood School District v. United States,* 433 U.S. 299, 307-308 (1977).

Several lower courts have explicity drawn an analogy between the use of statistics by plaintiffs to prove a prima facie case of discrimination and the use by employers of statistical disparities to justify remedial affirmative action. The court in *Tangren v. Wackenhut Services,* 480 F.Supp. 539 (D. Nev. 1979), *aff'd* 658 F.2d 705 (9th Cir. 1981), *cert. denied,* 456 U.S. 916 (1982) noted that courts have consistently held that statistical evidence is sufficient to establish a prima facie case of unlawful discrimination and concluded that "[i]f such a showing is sufficient to permit the imposition of legal sanctions, a fortiori, the same showing should permit an employer and union to adopt a voluntary affirmative action program." 480 F.Supp. at 547; *accord, Bushey v. New York State Civil Service Commission,* 733 F.2d at 228. Similarly, the Ninth Circuit opinion below observed that the statistical evidence was sufficient to establish a prima facie case of discrimination. 770 F.2d at 758, n. 5. Indeed the evidence of female representation among 238 skilled craft positions in the Santa Clara County Transportation Agency stood at the "inexorable zero." *See Teamsters v. United States,* 431 U.S. at 342, n. 23. By

any standard this evidence standing alone would have established a prima facie case and thereby justified the program.

Because of the gross underrepresentation of women in its skilled craft jobs, the Agency was particularly vulnerable to lawsuits claiming sex discrimination. Courts have consistently held that evidence of gross statistical disparities between the percentage of minority or female workers and the percentage of minorities or females in the population is sufficient to establish a prima facie case of disparate treatment on the basis of race or sex. *E.g., Dothard v. Rawlinson,* 433 U.S. 321 (12.9 percent female work force compared to 52.75 percent females in population); *United States v. City of Alexandria,* 614 F.2d at 1364 (5th Cir. 1980); *Kaplan v. I.A.T.S.E., Local 659,* 525 F.2d 1354, 1358, n. 1 (9th Cir. 1975) (no female photographers); *Jones v. Lee Way Motor Freight, Inc.,* 431 F.2d 245, 247 (10th Cir. 1970) (no black line drivers); *Kilgo v. Bowman Transportation, Inc.,* 570 F.Supp. 1509 (N.D. Ga. 1983).

III. THE AGENCY AFFIRMATIVE ACTION PLAN IS NARROWLY TAILORED TO ACHIEVE ITS REMEDIAL PURPOSE.

This Court in *Weber* declined to "define in detail the line of demarcation between permissible and impermissible affirmative action plans." 443 U.S. at 208. It did, however, provide some guidance by holding that the Kaiser plan was a permissible one and outlining the factors compelling that conclusion. The Court concluded that the Kaiser plan fell on the permissible side of the line because: (1) it was designed to open employment opportunities in an occupation traditionally closed to black workers; (2)

it did not "unnecessarily trammel" the interests of white workers or create an absolute bar to their advancement; and (3) it was a temporary measure intended to eliminate a racial imbalance, but not to maintain racial balance. 443 U.S. at 208. The court below applied these criteria to the Agency's plan and correctly determined that by this measure the Agency's plan also fell on the permissible side of the line.

First of all, the plan was adopted to eliminate a manifest sexual imbalance in a job classification traditionally segregated by sex. Many courts have recognized that women have been almost wholly excluded from skilled craft positions and from apprenticeship programs leading to employment in such jobs. *E.g., Thompson v. Sawyer,* 678 F.2d 257; *Local Union No. 35 of International Association of Electrical Workers v. City of Hartford,* 625 F.2d 416; *Davis v. Richmond, Fredericksburg & Potomac Railway Co.,* 593 F.Supp. 271. The evidence regarding the Agency's hiring for such positions is consistent with this general history of exclusion of females from such jobs—at the time of the challenged promotional decision all 238 skilled craft jobs in the Agency were filled by men and no woman had ever held such a job.

Correction of the traditional exclusion of women from skilled craft positions was not the sole purpose of the Transportation Agency's affirmative action plan. The plan also applied to other traditionally disadvantaged groups and to other job classifications, some of which were not traditionally segregated. However, petitioners herein do not challenge the affirmative plan in toto—they merely argue that it did not serve to insulate this particular em-

ployment decision from liability under Title VII. Thus their arguments regarding the features of the plan that related to other job classifications are simply not necessary or even relevant to the disposition of this case.[8] The Transportation Agency considered Diane Joyce's sex as a factor in determining that she should be promoted in part to remedy the longstanding pattern of exclusion of women from skilled craft jobs. Had it failed to do so it would have perpetuated the historically segregated character of the job even though James Graebner, the appointing official, viewed Mr. Johnson and Ms. Joyce as "essentially equal in qualifications." Pet. App. 3A. Thus in this respect, this employment decision based on this affirmative action plan is fully consistent with the Court's decision in *Weber*.

The next factor considered by the Court in *Weber* was the effect of the challenged affirmative action plan on the interests of white employees who might be disadvantaged by its operation. Of course the effect of the plan on Paul Johnson was to deny him a promotion that he perhaps would have received had the affirmative action plan not been in effect. The effect on Brian Weber was equally direct; he was denied entry into a training program while black employees with less seniority than he were admitted. This Court necessarily weighed the harm to innocent white employees like Brian Weber against the necessity for undoing the legacy of many years of racial (and sexual) segregation in the job market. And on balance the Court

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8. Indeed the record in this case is silent as to what action the Agency took to meet its hiring and promotional goals for other job classifications.

considered not merely the effect on Brian Weber, the individual, but the effect on white applicants as a group. The Court stated: "[t]he plan does not require the discharge of white workers and their replacement with new black hirees . . . [n]or does the plan create an absolute bar to the advancement of white employees." 443 U.S. at 208. This language applies equally to the Transportation Agency's plan.

In fact, the impact on male employees in the instant case is less intrusive than that of the plan approved in *Weber*. The ordinary application of the *Weber* plan called for allocation of 50 percent of the trainee positions to black persons and 50 percent to white persons. On the contrary, the Agency plan as it relates to this promotional decision contained a *goal* of achieving 36.5 percent women employed in skilled craft positions. Obviously no particular implementation ratio was used because the appointing official was free to appoint a male even though males had received all prior appointments. All the plan requires is that the appointing official *consciously consider* qualified female applicants, and, as in this case where women had been wholly excluded, sex might be the determinative factor in making the decision. The plan did not require that a fixed percentage of women be promoted and it permitted, and indeed, required, consideration of relative qualifications.

Therefore, this plan does not contain the features which led this Court to disapprove the affirmative action plan in the *Wygant* case. The Court in that case expressed its concern with the severe burden of non-minority workers of a plan which caused loss of an existing job:

"[i]n cases involving *hiring* goals, the burden to be borne by innocent individuals is diffused to a considerable extent among society generally." 106 S.Ct. at 1851. Promotional goals are even less intrusive than hiring goals because the unsuccessful applicant for promotion remains employed and may compete for other promotional opportunities.

Finally, the plan was intended not to maintain but to achieve racial and sexual balance and thus would end when its goals were achieved. Therefore, the Ninth Circuit concluded that it was a temporary plan.

The Court in *Weber* did not intend to prescribe general standards for determining the validity under Title VII of all voluntary affirmative action plans; it merely indicated those features of the Kaiser plan that caused it to fall on the permissible side of the line. Lower courts have attempted to formulate general standards for determining the validity of voluntary affirmative action efforts including those by public employers. Several of these courts have developed a constitutional standard. In *Valentine v. Smith,* 654 F.2d 503 (8th Cir. 1981), *cert. denied,* 454 U.S. 1124 (1981), a case challenging a race-conscious affirmative action plan initiated by Arkansas State University, the court articulated its standard as follows:

> "The test for determining whether Arkansas has adopted constitutionally permissible means is whether the affirmative action plan is 'substantially related' to the objective of remedying prior discrimination. A race-conscious affirmative action program is substantially related to remedying past discrimination if (1) its implementation results or is designed to result in the hiring of a sufficient number of minority

> applicants so that the racial balance of the employer's work force approximates roughly, but does not unreasonably exceed, the balance that would have been achieved absent the past discrimination; (2) the plan endures only so long as is reasonably necessary to achieve its legitimate goals; (3) the plan does not result in hiring unqualified applicants; and (4) the plan does not completely bar whites from all vacancies or otherwise unnecessarily or invidiously trammel their interests." 654 F.2d at 510.

This test has the advantage of taking into account all of the considerations mentioned by the Court in *Weber* as well as an additional factor—that applicants to be hired or promoted be qualified for the position in question—not relevant to the Court in *Weber* because the plan at issue was a training program whose only qualification was being a current employee of the company.

In some circumstances an employer might be justified in adopting a short-term goal higher than the proportion of minority persons in the relevant population. *Bratton v. City of Detroit*, 704 F.2d 878.

This test also permits a weighing of the competing goals of remedying manifest racial and sexual imbalances with the interests of male and non-minority employees. By requiring that a plan's goal be achievement of approximately the hiring ratios that would have obtained absent past discrimination this test assures that the plan's focus truly is on remedying the effects of past discrimination and not merely the achievement of an ideal racial and sexual balance. Adoption of such modest goals will also minimize the impact of the plan on male and non-minority

employees by limiting its duration and by reducing the number of hiring decisions that will include race or sex as a factor.

To illustrate the practical use of this test, the court in *Valentine v. Smith* determined that Arkansas State University set a goal of raising the percentage of black faculty to a total of five percent between 1976 and 1979; to accomplish this goal required that 25 percent of the new faculty hired be black. The court concluded that the goals of the challenged plan were substantially related to the university's objective of remedying past discrimination.

Judged by the *Valentine v. Smith* test, the promotional decision is valid under the Constitution and under Title VII. As argued above, the plan was adopted to correct a significant underrepresentation of females in skilled craft jobs, among others. Its implementation was intended to achieve parity between the proportion of women throughout the County's labor force and the proportion of women employed by the County in various job classifications. This is generally the result to be expected absent discrimination. *Teamsters v. United States*, 431 U.S. at 340, n. 20. However, even assuming for the sake of argument that the 36.5 percent goal for participation of women was too high, the particular sex-conscious promotional decision at issue here is still valid. Prior to promoting Diane Joyce, the percentage of women in skilled craft positions was zero, after she was promoted the percentage increased only 0.4 percent, still substantially lower than the percentage to be expected absent discrimination.

The plan of its own terms would endure only so long as necessary to achieve its goals and the record indicates that a new plan was adopted in 1982 containing different goals. The plan did not result in hiring unqualified applicants; there is no question that Joyce was qualifed for the position to which she was promoted. There is no evidence in the record that the plan completely barred male or white employees or otherwise unnecessarily infringed their interests. The plan did not contain a fixed quota nor does the record indicate the number of males who were affected by it.

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CONCLUSION

As de Tocqueville stated in reference to slavery, "[a] natural prejudice leads a man to scorn anybody who has been his inferior, long after he has become his equal; the real inequality . . . is always followed by an imaginary inequality rooted in mores."[9] Until that imaginary inequality of women and blacks in the job market passes from the minds of decision makers, employers must have the freedom to take affirmative action required to counteract it. Thus in the short term, sex and race-conscious hiring and promotional goals narrowly tailored to remedy past dis-

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9. de Tocqueville, *Democracy in America* 341 (Mayer ed. 1969).

criminatory are necessary and are lawful under Title VII and the Constitution.

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IN THE

Supreme Court of the United States

PAUL E. JOHNSON,

Petitioner,

—v.—

TRANSPORTATION AGENCY, SANTA CLARA COUNTY, CALIFORNIA, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICI CURIAE

For NOW Legal Defense and Education Fund; National Organization for Women; American Civil Liberties Union; California Women Lawyers; Employment Law Center; Equal Rights Advocates; Federally Employed Women Legal and Education Fund; League of Women Voters of the United States; NAACP Legal Defense and Educational Fund; National Women's Law Center; Northwest Women's Law Center; Women Employed; Women's Equity Action League; Women's Law Project; Women's Legal Defense Fund

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INTERESTS OF AMICI CURIAE*

The NOW Legal Defense and Education Fund, The Women's Legal Defense Fund and other amici are organizations dedicated to securing equal rights for women under the law.**

STATEMENT OF THE CASE

Amici adopt the Statement of the Case as set forth by the Respondent in the instant case.

SUMMARY OF ARGUMENT

This case provides this Court with its first opportunity to address the lawfulness, under Title VII, of sex-based voluntary affirmative action. In light of the similar historic and pervasive discrimination suffered by both women and minorities in the workplace, and Title

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* Letters of the parties reflecting their consent to the filing of this brief are being filed in the Court.

** Descriptions of these organizations appear in the Appendix to this brief.

VII's equal treatment of sex and race discrimination, prior decisions of this Court upholding race-based affirmative action are controlling.

In this regard, this Court has repeatedly recognized that Title VII specifically allows employers to take voluntary affirmative, race-conscious steps to remedy discrimination against minorities -- and, by analogy, women. Decisions of the Court have also recognized that voluntary measures to comply with Title VII are preferred to litigation, and that employers may implement such affirmative action plans based solely on gross statistical disparities in the work force, without specific admissions of past discrimination.

In this case, the implementation of an affirmative action plan by the Santa Clara County Transportation Agency was justified

by the significant underrepresentation of women in various job categories, the gender-based hierarchy within the Agency, and numerous allegations of sex discrimination. The Santa Clara affirmative action plan thus fully complies with the requirements of Title VII as expounded by this Court in United Steelworkers of America v. Weber, 443 U.S. 193 (1979).

Finally, numerous studies have demonstrated that, in the face of continuing sex discrimination, particularly against women seeking to enter non-traditional occupations, affirmative action is a uniquely effective remedy.

ARGUMENT

I. THE SANTA CLARA TRANSPORTATION AGENCY HAS MET THE PREDICATE FOR VOLUNTARY ADOPTION OF AN AFFIRMATIVE ACTION PLAN.

Petitioner's challenge is brought under Title VII of the Civil Rights Act of

1964, 42 U.S.C. § 2000e et seq.[1] Title VII

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[1] Both Petitioner and the United States as amicus curiae have argued that this case must be analyzed not only under Title VII, but, because Respondent is a public employer, under the Equal Protection Clause of the Fourteenth Amendment as well. See Petitioner's Brief, at 19-24; Brief for United States, at 6, 9-11. However, there is no Fourteenth Amendment claim properly before this Court. This litigation was filed and tried as a claim for relief under Title VII; no record has been developed with respect to the lawfulness of Respondent's plan under the Fourteenth Amendment. Johnson v. Transportation Agency, Santa Clara County, 770 F.2d 752, 754 n.1 (9th Cir. 1985) ("Johnson did not challenge the ... plan on equal protection grounds and we do not reach that issue."). If such a claim is to be made, it must be addressed to the district court in the first instance. See Local No. 93 v. City of Cleveland, 106 S.Ct. 3063, 3073 n.8 (1986) ("In the posture in which this case comes to us, we have no occasion to address the circumstances, if any, in which voluntary action by a public employer that is permissible under § 703 [of Title VII] would nonetheless be barred by the Fourteenth Amendment. Rather...we leave questions regarding the application of the Fourteenth Amendment ...to further proceedings before the district court.") Moreover, amici cannot help but note the irony in Petitioner's and the United States' claim. Petitioner and the government urge this Court to apply strict scrutiny to sex-based affirmative action

is a broad, remedial statute designed to provide relief from a long history of discrimination faced by blacks, other minorities, and women.

Beginning with its decision in United Steelworkers of America v. Weber, 443 U.S. 193 (1979), this court has repeatedly recognized that race-conscious employment decisions made pursuant to an affirmative

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plans under the Fourteenth Amendment, rather than the intermediate standard of review adopted by this Court in all other cases of sex discrimination, see, Craig v. Boren, 420 U.S. 190, 197 (1976), and by some Justices of this Court in race-based affirmative action cases, see, e.g., Local 28, 106 S. Ct. 3019, 3052 (1986) (Brennan, J.); Wygant, 106 S. Ct. 1842, 1852-53 (1986) (O'Connor, J., concurring); Regents of the Univ. of Calif. v. Bakke, 438 U.S. 265, 357-62 (1978) (Brennan, Blackmun, Marshall, White, JJ.). In urging the application of strict scrutiny, however, Petitioner and the government would afford more protection to the group least in need of it -- white males. In the absence of adopting a uniformly strict standard of review for sex-based claims under the Constitution, such an anomaly in the treatment of sex discrimination should not be sanctioned by this Court.

action plan can be lawful under Title VII. See also Local No. 93 v. City of Cleveland, 106 S. Ct. 3063, 3072-73, n.8 (1986). Cf. Univ. of Calif. Regents v. Bakke, 438 U.S. 265, 353 n. 28 (1978) (Brennan, Marshall, White, and Blackmun, J. J., concurring in part, dissenting in part); Wygant v. Jackson Board of Education, 106 S.Ct. 1842 (1986). In enacting Title VII, Congress extended the same protection from discrimination based on race to discrimination based on sex. Los Angeles Department of Water & Power v. Manhart, 435 U.S. 702, 709 (1978). Thus, to the same extent that race-based affirmative action is deemed lawful under Title VII, sex-based affirmative action must similarly be upheld. As documented in Point III, infra, the historic and pervasive discrimination against women in the work force, so similar in both duration and nature to that

experienced by minorities, likewise justifies resort to such remedies.

A. An Employer May Voluntarily Adopt A Gender-Conscious Affirmative Action Plan On The Basis Of Gross Statistical Disparities In Its Work Force And Without Admitting Past Discrimination.

1. Voluntary Compliance With Title VII Is Preferred.

A majority of this Court has recognized that voluntary measures undertaken by employers to meet their obligations under Title VII are preferable to extensive and costly litigation. In Local 93, supra, Justice Brennan wrote for a majority of the Court:

> We have on numerous occasions recognized that Congress intended for voluntary compliance to be the preferred means of achieving the objectives of Title VII. This view is shared by the Equal Employment Opportunity Commission (EEOC), which has promulgated guidelines setting forth its understanding that "Congress strongly encouraged employers...to act on a voluntary basis to modify employment practices

> and systems which constituted barriers to equal employment opportunity."

106 S. Ct. at 3072 (citations omitted).

This view echoed the Court's earlier statement in Weber, supra, in which the Court wrote:

> "It would be ironic indeed if a law triggered by a nation's concern over centuries of racial injustice ... constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy."

443 U.S. at 204 (citation omitted).

In passing Title VII, Congress recognized that the long history of discrimination against minorities in America could not be reversed by the passage of the civil rights statute alone. Congress realized that only by a joint attack on invidious discrimination--voluntary actions taken by conscientious, responsible employers combined with

vigorous enforcement of Title VII--could society reach the point where each person is judged strictly on the basis of her or his own capabilities, without regard to race, sex, or religion. The value of voluntary actions by employers in remedying historical discrimination cannot be overestimated.[2]

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[2] See also Wygant, supra, wherein Justice O'Connor, concurring, recognized the "Court's and Congress' consistent emphasis on 'the value of voluntary efforts to further the objectives of the law.'" 106 S. Ct. at 1855, citing Regents of the University of California v. Bakke, 438 U.S. 265 (1978). Justice O'Connor continued: "The value of voluntary compliance is doubly important when it is a public employer that acts, both because of the example its voluntary assumption of responsibility sets and because the remediation of governmental discrimination is of unique importance." 106 S. Ct. at 1855.

2. An Employer Is Not Required To Admit Past Discrimination Before Implementing An Affirmative Action Plan.

This Court has ruled that Title VII does not require employers formally to admit to past discrimination in order to implement a lawful affirmative action plan. In Weber, supra, this Court upheld, under Title VII, an affirmative action plan agreed upon by an employer and a union, despite a District Court finding that the employer had not been guilty of any past discriminatory hiring or promotion -- a finding which was affirmed by the Court of Appeals and left undisturbed by the Supreme Court. 443 U.S. at 225, n.6 (Rehnquist, J., dissenting).

Sound public policy dictates this principle. As Justice O'Connor explained in her concurring opinion in Wygant:

> The imposition of a requirement that public employers make

> findings that they have engaged in illegal discrimination before they engage in affirmative action programs would severely undermine public employers' incentive to meet voluntarily their civil rights obligations....
>
> ...As is illustrated by this case, public employers are trapped between the competing hazards of liability to minorities if affirmative action is not taken to remedy apparent employment discrimination and liability to nonminorities if affirmative action is taken. Where these employers, who are presumably fully aware both of their duty under federal law to respect the rights of all their employees and of their potential liability for failing to do so, act on the basis of information which gives them a sufficient basis for concluding that remedial action is necessary, a contemporaneous findings requirement should not be necessary.

Wygant, 106 S. Ct. at 1855-1856.

Equally compelling reasons for rejecting a "contemporaneous findings" requirement were offered by Justice Marshall in his dissent:

> An explicit Board [of Education] admission or judicial determination of culpability...would only have exposed the Board in this case to further litigation and liability ...
>
> ...Petitioners would now have us inform the Board...that it should have delayed further [in integrating the school system], disputing its obligations and forcing the aggrieved parties to seek judicial relief. This result would be wholly inconsistent with the national policies against overloading judicial dockets, maintaining groundless defenses, and impeding good-faith settlement of legal disputes.... The Court is correct to recognize, as it does today, that formal findings of past discrimination are not a necessary predicate to the adoption of affirmative-action policies ...

Wygant, 106 S. Ct. at 1862-1863.

Thus, this Court has consistently recognized that requiring employers to admit to past discrimination prior to engaging in voluntary affirmative action would frustrate the purposes of Title VII and the enforcement of civil rights

generally. Only by continuing to reject a "contemporaneous findings" requirement will the Court help "create an atmosphere conducive to voluntary or local resolution of other forms of discrimination [those not eliminated by Title VII itself]". Weber, 443 U.S. at 204, citing H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963) at 18.[3]

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[3] Though Santa Clara County and its Transportation Agency were not required to admit to past discriminatory practices in order to implement the affirmative action plan, there are indications in the record that both the County and the Agency were aware of the connection between their employment policies and the underrepresentation of minorities, women, and handicapped persons in the Santa Clara work force.

In its 1978 "Equal Employment Opportunity Affirmative Action Plan" ["1978 Agency Plan"], the Agency acknowledged that "affirmative, aggressive, continuing" actions were required "to remedy the effects of past practices." Excerpts from Clerk's Record ["Record"] at 38. Under a section entitled "Corrective Action," the 1978 Agency Plan continues, "Remedying the effects of past employment practices which may have excluded the appointment and promotion of ethnic/racial minorities and women at various levels of the work force

3. Statistics That Demonstrate A Marked Gender Disparity In A Work Force Provide A Sufficient Basis For The Adoption Of An Affirmative Action Plan.

The Court has recognized that statistics alone can be used to prove employment discrimination, or at the very least to establish a plaintiff's prima facie case. In Teamsters v. United States, 431 U.S. 324 (1977), Justice Stewart, writing for the Court, explained:

> Statistics are...competent in proving employment discrimination....Evidence of a longlasting

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is one of the objectives of the Affirmative Action Plan." Record at 83.

Similarly, the 1979 "Affirmative Action Plan, County of Santa Clara" ["1979 County Plan"] states that "continuing affirmative action must be taken to remedy the effects of past practices". Record at 60.

In this regard, the Agency's position is similar to that of the employer, Kaiser Aluminum, in Weber, supra, where "Kaiser denie[d] prior discrimination, but concede[d] that its past hiring practices may be subject to question." Weber, 443 U.S. at 210 (Blackmun, J., concurring).

> and gross disparity between the composition of a work force and that of the general population thus may be significant even though § 703(j) [of Title VII] makes clear that Title VII imposes no requirement that a work force mirror the general population.

431 U.S. at 339 n.20.

Since Teamsters, a majority of the Court has agreed that significant statistical disparities may also justify the implementation of an affirmative action plan. In Weber, supra, the Court relied on statistical data which indicated that only 1.83% of the skilled craft workers in one of Kaiser's plants was black, while the local work force was approximately 39% black. In a concurring opinion, Justice Blackmun wrote, "[T]he Court...measures an individual employer's capacity for affirmative action solely in terms of a statistical disparity. The individual employer need not have engaged in discriminatory

practices in the past." Weber, 443 U.S. at 213. Cf. Wygant, supra, in which Justice O'Connor further explained the role of statistics in implementing an affirmative action plan:

> Public employers are not without reliable benchmarks in making [the determination to implement an affirmative action plan]. For example, demonstrable evidence of a disparity between the percentage of qualified blacks on a school's teaching staff and the percentage of qualified minorities in the relevant labor pool sufficient to support a prima facie Title VII pattern or practice claim by minority teachers would lend a compelling basis for a competent authority such as the School Board to conclude that implementation of a voluntary affirmative action plan is appropriate to remedy apparent prior employment discrimination.

Wygant, 106 S. Ct. at 1856.

The Court has thus recognized that an employer may voluntarily adopt an affirmative action plan, based solely upon a significant statistical disparity between

the percentage of blacks or other protected groups in its work force and their representation in the relevant labor pool.

B. The Substantial Statistical Disparity And Allegations Of Sex Discrimination Justified Santa Clara County's Implementation of a Voluntary Affirmative Action Plan.

In developing its affirmative action plan, the Agency properly recognized the need for voluntary measures to remedy past discrimination. On the first page of its memorandum explaining its 1978 Plan, the Agency set forth its reasons for implementing the plan:

> The County and Transit District Boards of Supervisors recognize that mere prohibition of discriminatory practices is not enough to remedy the effects of past practices and to permit attainment of an equitable representation of minorities, women and handicapped persons. Affirmative, aggressive, continuing actions are required to attain this goal.

Record at 38. As a number of cases decided by this Court have demonstrated, even repeated legal prohibitions of discrimination may be insufficient to prevent discriminatory practices. See, e.g., Local 28, Sheet Metal Workers v. E.E.O.C, 106 S. Ct. at 3019.

In the face of the persistent underrepresentation of women in five of the seven major E.E.O.C. categories at the Agency, Record at 51, and numerous allegations of discrimination on the basis of gender, see infra at pp. 20-24, the voluntary measures taken by the County are the precise actions a public employer should take. Rather than allowing the gross underrepresentation to continue and risking lawsuits due to the County's "very weak posture in terms of Title VII" (Reporter's Transcript of Proceedings ["Transcript"] at

12), the County chose to implement a narrowly tailored affirmative action plan.

In this case, the statistical under-representation of women in the Santa Clara work force was drastic. Statistics in the 1978 Agency Plan demonstrated that of the 124 Agency employees who were in the E.E.O.C. category of "Technicians," only 9.7 percent were women. Women comprised only 8.6 of the "Professionals", and only 7.1 percent of the "Officials and Administrators". Of the 238 "Skilled Craft Workers"--the position for which Diane Joyce successfully applied--all were male at the time of the implementation of the affirmative action plan. "Service and Maintenance Workers," the category best integrated, still included only 22 percent women. Record at 49.

The statistics clearly demonstrated not only that "women are the most under-

represented group in the Agency" (Record at 51), but also that one hundred percent of the skilled craft workers were men--a disparity even greater than the racial disparity among the skilled craft workers in the Weber case. See supra, p. 15.

In addition to the statistical disparity noted above, other evidence of sex discrimination within the Agency is evident from the record.

Diane Joyce, who received the promotion to the road dispatcher position which Petitioner Johnson claimed was rightfully his, alleged that she repeatedly encountered discrimination on the basis of sex:

> A. ...Many times I felt I was discriminated against because of my sex, but I don't think I ever filed or complained or any formal grievances because of it, simply because it would be very difficult to prove.

Transcript at 118.

Joyce alleged, for example, that stereotypical attitudes and prejudices prompted male supervisors to seek a man to fill an account clerk position in 1972. Transcript at 110-11. Although she eventually obtained the job, Joyce alleged that she faced many major instances of what she perceived as discrimination. Transcript at 119. Additionally, as the first woman to be a road maintenance worker, Transcript at 111, Joyce found it "difficult" due to the attitudes of the male road maintenance workers, who were uncomfortable working with a woman. Transcript at 112. She felt "singled out", Transcript at 90, because she was denied opportunities to "work out of class," Transcript at 115-16, and actually had to file a grievance before she was able to receive coveralls routinely issued to men. Transcript at 89-90.

Joyce continued to experience discrimination when she applied for a promotion to become a road dispatcher. One of the three male supervisors involved in the selection process for the position referred to Joyce as a "rebel-rousing [sic], skirt-wearing person," Transcript at 153, and also said that Joyce was "not a lady" because of her use of "rough language". Transcript at 161. Another of the three interviewers scheduled Joyce's oral interview during a time he knew she was unavailable. Transcript at 95-96. As a result of these and other experiences which she perceived as sex discrimination on the basis of sex during her employment with the Agency, Transcript at 118-19, Joyce contacted the affirmative action coordinator of the department, in an attempt to get "fair consideration for the job." Transcript at 95.

In addition to Joyce's experiences, other examples of discrimination appear in the record. James Graebner, the director of the Agency, stated that he was aware of a number of charges of sex discrimination since 1978 that had been brought to the attention of the affirmative action officer, including allegations of discrimination among the skilled craft workers (the category to which Joyce and Petitioner Johnson belonged). Transcript at 43.

Myra Beals, who at the time of Joyce's promotion was the assistant personnel officer at the Agency, also testified regarding discriminatory practices encountered by women in the agency. The occurrences included, inter alia, a woman who was denied training, essential for a promotion, given to men in her position, Transcript at 231, 252-53; a pregnant woman denied employment as a utility worker, even

though her pregnancy did not affect her ability to do the job, Transcript at 256; and harassment and threats that Joyce faced as a road maintenance worker, Transcript at 254-55.

Thus, it is clear that the County and Agency plans were premised not only on statistical disparities which indicated a severe underrepresentation of women in the Santa Clara work force, but were justified as well by numerous allegations of specific instances of discrimination on the basis of sex. Given this factual background, Santa Clara's adoption of the plan was clearly lawful under prior decisions of this Court.

II. THE SPECIFIC ELEMENTS OF THE SANTA CLARA AFFIRMATIVE ACTION PLAN FULLY COMPLY WITH TITLE VII UNDER THE STANDARDS ESTABLISHED IN UNITED STEELWORKERS OF AMERICA v. WEBER.

The affirmative action plan adopted by Santa Clara County meets the legal stan-

dards first articulated by this Court in Weber, supra. In that decision, the Court, without "detail[ing] the line of demarcation between permissible and impermissible affirmative action plans," identified four elements which placed the Kaiser Aluminum plan "on the permissible side of the line". 443 U.S. at 208. [4]

The Weber decision, interpreted in the context of a gender-conscious affirmative action plan, requires that the plan (1) be designed to open employment opportunities to women and break down old patterns of gender segregation and hierarchy; (2) not unnecessarily trammel the interests of male

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[4] Given this Court's description in Weber of the criteria characterizing a lawful voluntary affirmative action plan under Title VII, the government's assertion that no "majority opinion of this Court ever set forth with precision any simple test or sweeping rule for determining under what circumstances class-based remedies are permissible" is misleading. Brief for Unites States at 12.

employees; (3) not create an absolute bar to the advancement of male employees; and (4) be a temporary measure. 443 U.S. at 208. While the Weber opinion does not state that all four of these elements must be present for an affirmative action plan to be valid under Title VII, it does state that any plan which meets these four elements will be valid under Title VII.

As discussed infra, pp. 26-42, the affirmative action plan adopted by the Agency fully meets each element of the Weber test.

A. The Plan Was Designed To Open Up Employment Opportunities To Women And Break Down Old Patterns of Segregation And Hierarchy.

The Agency affirmative action plan was intentionally designed to expand the employment opportunities available to women. The 1978 Agency Plan states that

the affirmative action plan was required to assure that:

> b. Any possible barriers to employment promotion of...women...are removed.
>
> c. Aggressive and imaginative continuing efforts are made to attract and assist...women...to qualify for employment and promotion as needed to attain an equitable representation in all occupational fields and at all job levels.

Record at 38.

As discussed supra, pp. 19-20, the 1978 Agency Plan detailed the significant underrepresentation of women in five of the seven major E.E.O.C. categories in the Transportation Agency. The plan also provided ample evidence of a gender-based hierarchy in the Santa Clara Department of Transportation: the percentage of women in each E.E.O.C. category generally decreased with movement up the work force hierarchy to positions involving greater responsibility. Thus, while 90 percent of the

paraprofessionals and 75.9 percent of the office and clerical workers were women, only 8.6 percent of the professionals and 7.1 percent of the officials and administrators were women. Record at 49.

To increase the employment opportunities for women, the 1978 Agency Plan established an employment goal of 36.4 percent women within each job category in the Agency, to match the percentage of women in the County work force. Record at 52. Since the Plan recognized that it would be "extremely difficult" to increase the representation of women in certain job classifications, the Plan "mandates that the Agency's Affirmative Action employment goals be attained in successive stages": first for the Agency as a whole, then by E.E.O.C. job category, then by the major job classifications used by the Agency. Record at 54. The 1978 Agency Plan

specifically states that yearly hiring goals should be established for three purposes:

1. Provide a guide to the Agency Personnel Office and Division Directors indicating specific job classifications where underrepresentation of women...exists and where Affirmative Action is required.

2. Provide an objective standard for use in determining if the representation of...women...in particular job classifications is at a reasonable level in comparison with estimates of the numbers of these groups in the area work force....

3. Permit adjustment of Agency hiring goals as may be necessary because of limitations on hiring or reductions in the County work force....

Record at 55-56.

The 1978 Agency Plan also established that "one of the primary actions to increase employment opportunities for women is to establish positions and related training programs that will permit women

with minimal experience to enter and progress to job classifications where they are underrepresented". Record at 53. The Plan recognized that the slow expansion of the Transportation Agency would make it difficult to meet the Plan's employment goals. Therefore, the Plan urged that to whatever extent promotions were made, every attempt should be made to benefit women, minorities, and the handicapped. The Plan recommended the following steps:

> 1. All appointments to be made in categories in which underrepresentation exists will receive special attention....
>
> 2. ...When an appointment is made that does not include a member of the protected-classes, the Affirmative Action Coordinator will be informed before the appointment is made.

Record at 86. The Plan also required that supervisory personnel become familiar with the Plan, explain the Plan to their subordinates, and "give all possible

support to attainment of its objectives." Record at 46.

Another key goal of the 1978 Agency Plan was to ensure that women "get the maximum opportunity for placement and career progression" in the 734 newly authorized positions created by the expansion of the County Transit System. Record at 54-55.

Graebner, the director of the Agency, testified regarding other affirmative actions taken in accordance with the plan, including specific plans to recruit women and minorities to be bus drivers, Transcript at 51; advertising and public presentations to recruit women to be engineers, Transcript at 52; and speeches, presentations, and "word-of-mouth type of advertising" to recruit women and minorities for positions in the skilled crafts area, Transcript at 52-53.

All of the above measures were designed to increase the employment opportunities for women and minorities in the Agency and to make job categories which were at the time severely segregated by gender more representative of the Santa Clara County labor force.

B. The Plan Does Not Unnecessarily Trammel The Interests Of Male Employees, Nor Does It Create An Absolute Bar To Their Advancement.

The Agency affirmative action plan does not unnecessarily trammel the legitimate interests of male employees, and does not act as an absolute bar to their promotion. The Plan creates no absolute preferences for women in any job category. While supervisors are encouraged to hire and promote women in positions in areas where women have been underrepresented, there are no requirements that a woman be hired to fill any particular job. The plan reflects

the Agency's awareness that its prior promotional practices had done nothing to alleviate the gross underrepresentation of women; rather than continue prior practice, the Agency correctly chose to implement promotional goals. In this sense, the Plan's goals are to be differentiated from quotas, which would require the hiring of a specified percentage of women. See Record at 67 ("The 'goals' established for each County Department/Agency should not be construed as 'quotas' that must be met. The 'goals' should rather be seen as realistic desired levels of achievement correcting imbalances in a Department/ Agency work force.").

The goals were also designed to be flexible and responsive to changes in the county work force. The 1979 County Plan states, "Goals should take into account such factors as turnover, layoffs, lateral

transfers, new job openings, retirements and availability of minorities, women and disabled persons in the area work force who possess the desired qualifications or potential for placement." Record at 67.

Similarly, the goals established in the 1982 Santa Clara County Transportation Agency Plan ["1982 Agency Plan"] recognized the difficulty of identifying qualified women for particular job categories, and also the impact that a countywide hiring freeze would have on the affirmative action goals. For example, though the overall plan set a goal of 36.4% women in each job category, Record at 52, the 1982 plan established a goal that only 3 of the projected 55 people to be hired as skilled craft workers be women, corresponding to less than 6% of the new hires. Record at 85.

The 1978 Agency plan also included a regular annual review to reevaluate the numerical goals of the plan and make any necessary adjustments. Record at 55-56.

These and other elements of the 1978 Agency plan demonstrate that it was tailored to insure that its goals were realistic and did not require layoffs of male employees or the hiring or promotion of unqualified workers.

Additionally, while the affirmative action plan was designed to remedy gradually the longstanding underrepresentation of women in the Agency, it did not interfere with the Agency's commitment to hiring and promoting only qualified candidates. Joyce was clearly qualified to fill the road dispatcher position, as recognized in the testimony of James Baldanzi, Transcript at 154, and Graebner, Transcript at 24-25, and as evidenced by her successful perfor-

mance of the job since her promotion, Transcript at 72-73.[5]

Nor did the plan obstruct the normal operation of the Agency's merit selection plan. Under the Agency's "rule of seven", the merit selection process guaranteed only that an applicant chosen to fill a position would be one of the top seven individuals who passed the promotional examination. Transcript at 18-19. The appointing authority retained the discretion, consis-

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[5] Whether or not Johnson was more qualified than Joyce to fill the road dispatcher position is not relevant to the legitimacy of the County plan since both were fully qualified under the County's merit selection plan. See text, infra. An affirmative action plan can legally provide a preference to those persons who are members of groups which have been subject to a long history of discrimination, as long as the persons who are ultimately hired or promoted are in fact qualified. Cf. Weber, supra, where the Court upheld an affirmative action plan where "[t]he most senior black selected into the program had less seniority than several white production workers whose bids for admission were rejected." 443 U.S. at 199.

tent with the merit selection process, to hire or promote any one of the top seven candidates. Transcript at 19.

Finally, the Wygant majority opinion also suggests that an affirmative action plan involving promotional goals is significantly less likely to run afoul of Title VII than a plan requiring layoffs. In their operation, promotional goals more closely resemble hiring goals than layoffs, in that they involve only the denial of a future employment opportunity, which "is not as intrusive as loss of an existing job." Wygant, 106 S. Ct. at 1851. Similarly, an employee's expectations of a continued income and job security are not affected by promotional goals, as they would be by layoffs. In addition, unlike both hiring goals and layoffs, promotional goals at least insure that the employee whose interests may be affected retains a

job with the employer in question, as well as an opportunity to compete again for a promotion at a later date. [6]

C. The Agency Affirmative Action Plan Is Temporary.

The affirmative action plan at issue in this case also meets the fourth Weber criterion in that it is temporary and will end when a representative work force is attained.

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[6] Indeed, Petitioner was eventually promoted to the position of road dispatcher, after an additional road dispatcher position was created. Respondent's Brief in Opposition to Certiorari at 6 n.4. In any event, this Court has repeatedly recognized that "innocent" persons may be required to share in the burden of remedying employment discrimination. See Fullilove v. Klutznick, 448 U.S. 448, 484 (1980) ("It is not a Constitutional defect in this program that it may disappoint the expectations of non-minority firms. When effecting a limited and properly tailored remedy to cure the effects of prior discrimination, such a 'sharing of the burden' by innocent parties is not impermissible."). See also Wygant, 106 S.Ct. at 1850 (Powell, J., joined by Burger, C.J., and Rehnquist, J.).

The Court of Appeals for the Ninth Circuit correctly found the 1978 Agency Plan to be temporary:

> The Agency plan clearly aims at attainment. The district court correctly found that the plan contains no date certain or other express statement of fixed duration. The plan, however, also contains no statement that it is intended to be permanent.... Moreover, the entire focus of the plan is on "attaining," rather than maintaining, balance.... Unlike the district court, we believe that this emphasis upon the "attainment" of a representative work force does "have the effect of ending preferential treatment to women" once parity is achieved.

Johnson, 770 F.2d at 756. The Court of Appeals also recognized that, since affirmative action plans are usually voluntarily adopted by employers who wish to "express and act upon their commitment to social justice," such plans should not be interpreted "so as to make their validity depend on technicalities in

drafting," since to do so "would only discourage their adoption and encourage litigation." 770 F.2d at 757.

The Court of Appeals also noted an important distinction between the affirmative action plan upheld by the Supreme Court in Weber and the Agency plan. The Weber plan required that a fixed percentage of openings be filled by minorities, necessitating that the plan have a reasonably explicit deadline. However, the Agency plan establishes no fixed percentages, but "allows flexibility in working towards the long-range goals, with special emphasis on recruitment, selection, training, and promotion of minorities, women, and the handicapped," making it less necessary for the plan to have an explicit ending date. Johnson, 770 F.2d at 757. By employing flexible goals that could be responsive to changes in the workforce

while continuing to work towards the ultimate achievement of the County's employment goals, the plan was clearly "not intended to maintain male-female balance, but simply to eliminate a manifest male-female imbalance." Id. (emphasis added). Just as a public employer can responsibly and legally use evidence of a racial disparity in its work force as a "reliable benchmark" for implementing an affirmative action plan, see Wygant, 106 S. Ct. at 1856 (O'Connor, J., concurring), a public employer can use statistical evidence of the underrepresentation of women in its work force as an "objective standard" for determining when affirmative action is no longer necessary.

As the Court of Appeals recognized, once the Agency has attained gender balance in its job categories, preferential treatment for women would end. Although,

as Agency Director James Graebner testified, the "desire to hire, to promote, to give opportunity and [illegible]ng on an equitable, non-discriminatory basis" will continue as a "permanent part" of the Agency's operations, Transcript at 49, the affirmative action plan will exist only as long as statistics continue to reveal a significant gender disparity and the continuing underrepresentation of women in the Santa Clara County work force.[7]

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[7] Both the District Court and the Petitioner relied on other testimony of Graebner to argue that the affirmative action plan was in fact permanent. However, as the Court of Appeals recognized, Graebner's testimony, when read in context, "is no more than an expression of the Agency's long-range commitment to affirmative action, and certainly not the expression of an Agency policy to continue the program beyond the point that the law allows." Johnson, 770 F.2d at 757.

See also Weber, where the Court was presented with similar testimony from an industrial relations superintendent at Kaiser, and nevertheless found the Weber plan to be temporary. ("Once the goal is reached of 39 percent...we will then revert

III. CAREFULLY TAILORED, GENDER-CONSCIOUS MEASURES ARE REQUIRED TO REMEDY THE HISTORIC AND PERVASIVE EMPLOYMENT DISCRIMINATION WOMEN HAVE EXPERIENCED.

Like minority males, women have suffered from pervasive and continuing discrimination. Like race discriminatio , sex discrimination has operated to exclude women from equal employment opportunity. And like the effects of race discrimination, the effects of sex discrimination must be remedied by aggressive enforcement of fair employment laws, coupled with affirmative measures that take into account the historic discrimination suffered by women.

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to a ratio of what the percentage is, if it remains at 39 percent and we attain 39 percent someday, we will then continue placing trainees in the program at that percentage.") 443 U.S. at 223 n.3 (Rehnquist, J., dissenting).

A. Women Have Suffered Histori Discrimination In Employment.

Sex-based employment discriminatio had its genesis in a culture that tradi tionally limited women to the domesti sphere and a legal system that supporte such constraints by viewing women as littl more than appendages to their spouses. The theory underlying restrictions upo women was based on the belief that women' natural role in life was that of wife an

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[8] The legal system that supported th treatment of women is akin to the syste that supported slavery:

> In the earlier common law, women an children were placed under th jurisdiction of the paternal power When a legal status had to be foun for the imported Negro servants in th seventeenth century, the nearest an most natural analogy was the status o women and children. The nint commandment -- linking together women servants, mules, and other property- could be invoked, as well as a grea number of other passages of Hol Scripture.

G. Myrdal, An American Dilemma: The Negr Problem and Modern Democracy 1073 (Twen tieth Anniversary Edition 1964).

mother, and that they should not venture outside their sphere. Thus, when women began to work outside the home, the occupations in which they found employment were those in keeping with their domestic roles: bakers in factories, jobs in laundries, canneries, and the textile and clothing industries.[9]

Law and custom prevented women from pursuing other occupations. Women were barred from the practice of medicine[10] and law[11]; indeed, they had to fight even to speak on a public stage.[12] Women came to

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[9] E. Flexner, Century of Struggle, Chap. II (rev. ed. 1975).

[10] Flexner, supra; M. R. Walsh, Doctors Wanted: No Women Need Apply (1977).

[11] Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873); Ex Parte Lockwood, 156 U.S. 116 (1893).

[12] G. Lerner, The Grimke Sisters of South Carolina (1967).

be accepted as teachers only when low budget allocations for public school systems forced school officials to hire women at lower wages that schools could afford and that women were forced to accept.[13]

As women entered the workplace in increasing numbers in the nineteenth and early twentieth centuries, their employment opportunities were additionally restricted by "protective" legislation.[14] Although such legislation was devised in part because of a desire to benefit workers, it served to buttress further the discriminatory notion that women were a special class of worker who could be excluded from

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[13] Flexner, supra.

[14] See A. Hill, "Protection of Women Workers and the Courts: A Legal Case History," 5 Feminist Studies 247 (1979). See also Babcock, Freeman, Norton, and Ross, eds., Sex Discrimination and the Law 28 (1975).

employment opportunities because of domestic and maternal responsibilities, and effectively excluded women from many higher-paying jobs.[15]

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[15] These laws were usually upheld based on the differences between the sexes:

> That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity, continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race...Still again, history discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior strength, and this control in various forms, with diminishing intensity, has continued to the present... Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not

During World War II women were encouraged to enter the workforce, particularly in war industries. Women's share of the labor force increased from 29% in 1941 to 37% in 1944. Many women entered jobs that were nontraditional for females. At the war's end, however, women lost their jobs to men returning to the civilian labor force.[16] A further consequence of World War II was the enactment of veterans' preference laws, which severely limited federal and state employment opportunities for women.[17]

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necessary for men and could not be sustained.

Muller v. Oregon, 208 U.S. 412, 420-422 (1908).

[16] Chafe, The American Woman: Her Changing Social, Economic and Political Role, 1920-1970, pp. 135-150 (1972).

[17] See Personnel Administrator of Massachusetts v. Feeney, 422 U.S. 256 (1979).

Women of color, who suffer from discrimination based on sex and race or national origin, have borne a double burden of exclusion from true equal employment opportunity. Although historically black women have participated in the labor force in larger numbers than white women, they fail to reap the benefits of their greater participation: black women historically worked only as domestic and personal servants.[18] Thus their participation in the workforce was limited by the stereotypes associated with their gender and their race.

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[18] Indeed, for a time, black women's concentration in domestic and personal service occupations increased as their participation in the paid labor force grew. J. Malveaux, Low Wage Black Women: Occupational Descriptions, Strategies Change, 4 (1984) (unpublished paper prepared for the NAACP Legal Defense and Educational Fund, Inc.) [hereafter cited as Low Wage Black Women].

B. Employment Discrimination Against Women Persists.

The passage of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., has eliminated most de jure employment discrimination against women, and the increased entry of women into the labor force has been unprecedented. In 1984, women constituted 43% of the labor force.[19]

Yet, even though women currently work outside the home in ever-growing numbers, they remain clustered in occupations that are predominantly female. Women are primarily clerical workers, service workers, health workers and elementary and secondary school teachers. Women's Bureau U.S. Department of Labor, Time of Change:

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[19] Black women were most likely to be in the labor force (55.5%), followed by white women (53.4%), and Hispanic women (49.8%). Reskin and Hartman, eds. Women's Work, Men's Work - Sex Segregation on the Job, National Academy (1986) [hereafter cited as Women's Work].

1983 Handbook on Women Workers [hereafter cited as Time of Change].

Black and Hispanic women similarly continue to be clustered in female-dominated occupations. Black women generally hold the lowest-paying among the traditionally female jobs: domestic and personal service work, child care workers, nurse's aides, and food counter workers.[20] Hispanic women, while also employed as clericals, are employed to a greater extent as operatives: dress makers, assemblers, and machine workers. Time of Change, supra.

Women's earnings also reflect continuing discrimination. In 1985, a woman aged 25 or over with four or more years of college who was working full-time, year-round, earned 64% of the salary of a

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[20] Low Wage Black Women, supra n. 18 pp. 8, 12-13.

similarly situated man. Women's Bureau, U.S. Department of Labor, The United Nations Decade for Women, 1976-1985: Employment in the United States, July 1985. Women of color are even less well off. Black women earn about 59 cents for every dollar earned by a man; Hispanic women, 55 cents. Bureau of Labor Statistics, U. S. Department of Labor, Employment and Earnings, (January 1985).

C. The Underrepresentation Of Women In Nontraditional Jobs In The Transportation Department Of Santa Clara County Is An Example Of A Pervasive Phenomenon.

The underrepresentation of women in jobs that are not traditional for female workers is striking evidence that women continue to be excluded from the full range of employment opportunities.

The presence of women in nontraditional occupations is generally minimal. Women comprised only 2.4% of skilled crafts

workers in 1984.[21] According to 1985 annual averages, women comprised 2% of workers in the construction trades generally; they were .5% of brickmasons and stonemasons, 1.2% of carpenters, and 3.1% of construction laborers.[22]

The exclusion of women from nontraditional occupations in the Santa Clara County Transportation Department is not unusual. The Southeast Women's Employment Coalition (SWEC) performed an analysis, based on figures received from the Federal Highway Administration of the U.S. Depart-

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[21] H. Hammerman, A Decade of New Opportunity-Affirmative Action in the 1970's, Table 3, "Occupational Distribution of Employed Women", p. 125 (1984) [hereafter cited as Affirmative Action in the 1970's].

[22] Bureau of Labor Statistics, U.S. Department of Labor, Employment and Earnings, (January 1986). These figures, of course, are a direct reflection of discrimination women have traditionally experienced in these occupations, and should not be viewed as an indication of lack of interest. See n. 27, infra.

ment of Transportation, of female participation in the work forces of 39 state departments of transportation. SWEC found that nation-wide, fewer than 4% of highway jobs are held by women, and one-fourth of 1% are held by women of color. The preliminary findings, released in December, 1985, focused on the promotion and hiring of women and minorities in six states. In California, only 17% of DOT employees were female and more than half worked in office or clerical positions; in Georgia, females constituted fewer than 10% of DOT employees, and no women served in official, administrative, or skilled craft positions; and in New York, women were less than 12.3% of the DOT workforce, and black women were only one-half of one percent.[23]

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[23] SWEC and a number of other organizations obtained the information as a result of complaints filed with the Department of Transportation and the Office

D. Employment Discrimination Means Poverty For Women And Their Families.

The discrimination suffered by women in the workplace, resulting in the inability to get jobs that pay well, has a devastating impact on the standard of living enjoyed by them and their families. The majority of women who work outside the home substantially or fully support themselves and their families. In 1981, about one in five women workers maintained families on their own. Women of color make even larger economic contributions to their families than do white women.[24]

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of Federal Contract Compliance Programs of the Department of Labor. The other three states examined in the preliminary findings were Maryland, Missouri, and Ohio. SWEC found that the six states' performance was not unusual; virtually all of the states studied had extremely poor hiring and promotion records for women and minorities.

[24] Women's Work, supra. Indeed, female headed households have always existed in substantial numbers. In any

In 1983 women represented 61% of all persons aged 16 and over who had incomes below the poverty level. In 1983, the proportion of poor families maintained by women alone was 47%. Nearly 72% of black families with income below the poverty level were headed by women alone. Forty-six percent of Hispanic families and 37% of white families were similarly situated. Women's Bureau, U.S. Department of Labor, 20 Facts on Women Workers (1984).

E. Affirmative Action Is An Effective And Necessary Tool In Ensuring That Women Achieve Equal Employment Opportunity.

Recent studies confirm that affirmative action, in the form of goals and

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period of history for which there are data, between one-fifth and one-half of all households were headed by women alone. See Journal of Women in Culture and Society No. 3, Part 2 at 95, 102, 103 (Spring 1976).

timetables, is an effective tool for women and minorities to achieve equal employment opportunity. For example, a 1983 study of the federal enforcement of Executive Order 11246, as amended, comparing contractor and noncontractor establishments, found that affirmative action has been successful in promoting the employment of minorities and females.[25] In 1984, the Office of Federal Contract Compliance Programs (OFCCP) released a study which reached the same conclusion.[26]

Moreover, only through the use of gender- and race-conscious measures can

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[25] J. Leonard, The Impact of Affirmative Action (1983). Leonard found that the "affirmative action goal is the single best predictor of subsequent employment demographics." Id., p. 25.

[26] Office of Federal Contract Compliance Programs, Employment Patterns of Minorities and Women in Federal Contractor and Non-Contractor Establishments, 1974-1980 (1984). See also Affirmative Action in the 1970's, supra.

women gain access to jobs from which they have been excluded in the past. Such measures serve not only as a spur to employers to recruit, hire, and promote qualified women, but as evidence to interested women that nontraditional jobs are an option for them.

Thus, for example, in 1977, as part of its mandate under Executive Order 11246, the Office of Federal Contract Compliance Programs (OFCCP) conducted a review of the status of women in the construction industry and concluded that numerical goals and timetables for women in construction were necessary to counteract the years of sex discrimination in the construction trades. The OFCCP surveyed 1970 Census data, held a series of hearings, and collected data on the experiences of a variety of public and private employers. The Census data revealed that women

constituted only 5% of the labor force in craft and kindred occupations, and only 1.2% of the construction labor force. Witnesses at the hearings testified that it was discrimination and not the lack of available and interested female applicants that was keeping the percentage of women in the construction trades at such a low level. The data collected were replete with examples of women applying for jobs once they become available.[27] OFCCP

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[27] 42 Fed. Reg. 41379 (1977). This corresponds with the experience of amici who, individually and collectively, have represented many women seeking nontraditional employment. See e.g., Kilgo v. Bowman Transportation Co., 570 F. Supp. 1509 (N.D. Ga. 1983), aff'd., 789 F.2d 859 (11th Cir. 1986) (over-the-road truck-driving); Christman v. American Cyanimid Co., 92 F.R.D. 441 (N.D. W.Va. 1981) (granting class action status) (chemical industry). In these and other situations, women refrained from seeking employment in industries or jobs which were "male only" by tradition or design, a fact reflected in both labor pool and applicant flow data. However, once women began to be hired,

concluded that "unless specific affirmative action steps are prescribed, construction employment opportunities will not reach the female workforce of this country."[28]

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usually under the threat of litigation or government review, applications from women increased dramatically, reflecting the existence of a pool of women workers previously discouraged by the employers' reputation for discrimination. This was also the conclusion of the Department of Labor in regulating affirmative action provisions for women in apprenticeship and training programs. See 43 Fed. Reg. 20760 et seq. (1978) ("Thus, the Department's experience indicates that there are women available and interested in entering the skilled trades. However, the longstanding reputation of the trades for excluding women discourages many women from applying for these jobs." 43 Fed. Reg. at 20763).

[28] 43 Fed. Reg. 14892 (1978). OFCCP confirmed its earlier findings in a more recent study of construction goals for women. OFCCP, Women in Construction (May, 1981). The authors of the 1981 study concluded that more women are available and interested in working in the construction trades than are participating, and that OFCCP goals created a demand for women construction workers and facilitated the employment of many of the women interested in work in the trades. See also Westley, A Territorial Issue: A Study of Women in the Construction Trades (1982).

The advances of women in the coal mining and shipbuilding industries are further examples of the need to use gender-conscious measures to open up nontraditional jobs for women. There were no women coal miners in 1973. In the early 1970's, OFCCP targeted the coal mining industry as one of several industries on which to focus its enforcement activities, with the result that coal mine operators began to comply with their affirmative action obligations under Executive Order 11246, as amended. The gains achieved by women because of this focus were dramatic. By December 31, 1980, 3,295 women had become coal miners. As a result of affirmative action, the percentage of women hired in the industry went from 0 to 8.7% in seven years.[29] Simi-

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[29] Examinination on Issues Affecting Women in Our Nation's Labor Force: Hearings Before the Senate Committee on Labor and Human Resources, 97th Cong., 1st

larly, the numbers of women workers dramatically increased when the Maritime Administration required shipbuilding contractors to establish goals and timetables for women. The contractors found that as more women were hired, more applied.[30]

The foregoing illustrates that it is only when specific, objective, gender-conscious measures are used that women gain access to nontraditional jobs. Indeed, women's interest in and availability for such jobs has been demonstrated whenever the setting of goals and timetables required employers to recruit and hire them.[31] Moreover, it is clear that the

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Sess. (1981) (testimony of Betty Jean Hall, Director, Coal Employment Project).

[30] Women's Work, supra at 77.

[31] Women's Bureau, U.S. Department of Labor, "A Woman's Guide to Apprenticeship" (1980).

scarcity of women in nontraditional jobs cannot be attributed to lack of desire by women for those jobs. When occupations become open, women have responded by moving into them.[32] Gender-conscious measures such as those employed by Respondent are necessary to ensure that more occupations become available to women. In adopting affirmative action goals for women, the Santa Clara County Transportation Agency was merely fulfilling its Title VII obligation to see that women achieve equal employment opportunity.[33]

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32 Women's Work, supra at p. 77. The editors found that women's occupational choices and preferences play only a limited role in explaining occupational segregation by sex. Id. at p. 80

33 See supra Section I. B., pp. 17-33.

CONCLUSION

For the foregoing reasons, Amici Curiae respectfully request that the decision of the United States Court of Appeals for the Ninth Circuit be affirmed.

Respectfully submitted,*

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APPENDIX

INTEREST AND DESCRIPTION OF AMICI CURIAE

The NOW Legal Defense and Education Fund ("NOW LDEF") is a non-profit civil rights organization that performs a broad range of legal and educational services nationally in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was established in 1970 by leaders of the National Organization for Women. A major goal of the NOW LDEF is eliminating barriers that deny women economic opportunities. In furtherance of that goal, NOW LDEF has participated in numerous cases to secure full enforcement of laws prohibiting employment discrimination, including cases before this Court involving challenges to the use of affirmative action remedies to achieve equal employment opportunity.

The National Organization for Women ("NOW") is the largest feminist organization in the United States, with a membership of over 150,000 women and men in more than 750 chapters throughout the country. Since its founding in 1966, a major goal of NOW has been the eradication of sex discrimination in employment, and the elimination of barriers that deny women economic opportunities and the ability to become economically self-sufficient. NOW believes that economic equality in the paid work force is fundamental to women's ability to achieve equality in other aspects of society. In furthering its commitment to that goal, NOW has participated in numerous cases and commented on proposed legislation and regulations to secure full enforcement of laws prohibiting employment discrimination, and is committed

to the use of affirmative action to achieve equal employment opportunity.

The American Civil Liberties Union ("ACLU") is a nationwide, non-partisan organization of over 250,000 members dedicated to protecting fundamental rights, including the right to equal treatment under the law. To help eliminate the pervasive problem of gender-based discrimination, the ACLU has established the Women's Right Project, which has appeared before this Court in many sex discrimination cases.

California Women Lawyers ("CWL") is a statewide association representing the interests of the approximately fifteen thousand women lawyers in the State of California. It has both individual members, including male and female lawyers, judges, and law students, and twenty-seven local affiliates throughout the state. CWL

is dedicated to education and advocacy regarding legal rights of women and equality of opportunity for women.

Employment Law Center is a project of the Legal Aid Society of San Francisco. The Center is committed to providing legal services to women, minorities and other disadvantaged persons in order to vindicate their right to equal employment opportunity.

Equal Rights Advocates, Inc. ("ERA, Inc.") is a San Francisco-based public interest legal and educational corporation specializing in sex discrimination. It has a long history of interest, activism, and advocacy in all areas of the law which affect equality between the sexes. ERA, Inc. has been particularly concerned with gender equality in the work force because economic independence is fundamental to women's ability to gain equality in other

aspects of society. ERA, Inc. believes that affirmative action is a necessary and appropriate step if women and minorities are to achieve equal opportunity in the workplace.

Federally Employed Women's Legal and Education Fund, Inc. is a non-profit organization, incorporated in 1977 under the laws of the District of Columbia. It was established to undertake legal, educational, and research activities in order to eliminate unlawful discrimination in the federal government on the basis of race, sex, religion, national origin, age, handicap, and lawful political affiliation. The Board of Directors of the Fund consists of federal attorneys and other federal employees, and attorneys not federally employed who have extensive experience in the area of federal employment opportunity. The Fund provides counseling, case screen-

ing, and other legal and educational services to federal employees. The Fund has a particular interest in the instant litigation to establish that affirmative action plans that call for increased representation of women in the federal workforce are not in violation of Title VII.

The League of Women Voters of the United States ("LWVUS" or "League") is a national, non-partisan, non-profit membership organization with a current membership of 110,000 in more than 1250 state and local Leagues in all 50 states, the District of Columbia, Puerto Rico and the Virgin Islands. Since being founded in 1920, the LWVUS's purpose has been to promote political responsibility through informed and active participation of citizens in government. The LWVUS believes that no person or group should suffer

legal, economic or administrative discrimination, and that government and private institutions share responsibility to provide equal opportunity in employment. As part of its commitment to the eradication of employment discrimination against minorities and women, the LWVUS has participated as an amicus in support of the use of affirmative action remedies in a number of major cases.

The NAACP Legal Defense and Educational Fund, Inc., is a non-profit corporation established under the laws of New York State. It was formed to assist black persons to secure their civil rights by means of litigation. For many years attorneys at the Legal Defense Fund have represented parties in litigation before this Court and the lower courts involving a variety of issues regarding racial discrim-

ination and race-conscious affirmative action plans.

The National Women's Law Center is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and to the corresponding elimination of sex discrimination from all facets of American life. Since 1972, the Center has worked to secure equal opportunity in the workplace through full enforcement of Title VII of the Civil Rights Act of 1964, as amended, and other civil rights statutes, and through the implementation of effective remedies for longstanding employment discrimination against women and minorities.

The Northwest Women's Law Center is a non-profit public interest law organization concerned with securing equal rights for women through the law. It has participated in federal and state litigation and public

education efforts directed toward ending unlawful discrimination on the basis of sex. The Law Center has analyzed and commented on local affirmative action plans designed to eliminate past effects of discrimination toward women and minorities. It believes affirmative action is an effective tool toward realizing equality.

Women Employed is a national organization, based in Chicago, with a membership of 3,000 women workers. Over the past ten years the organization has assisted working women with problems of sex discrimination. Women Employed also monitors the enforcement, actions and policies of the EEOC and Office of Federal Contract Compliance Programs with regard to a broad range of sex discrimination issues.

Women's Equity Action League ("WEAL") is a national non-profit membership organization dedicated to securing the

legal and economic rights of women. The effective enforcement of civil rights laws has been a major priority of WEAL since its founding in 1968, particularly with respect to the remedy of employment discrimination through affirmative action.

Women's Law Project is a non-profit law firm dedicated to advancing the status of women through litigation and public education. Founded in 1973, the Women's Law Project has conducted major litigation on behalf of women in the areas of reproductive freedom, family law, discrimination in employment, credit and insurance, and the rights of female prisoners.

The Women's Law Project is especially concerned with the problems of employed women, and has challenged through litigation and public education layoff policies which disproportionately affect women or minorities. Women's Law Project believes

in the validity of and necessity for sex- and race-based preferences to remedy handicaps of past discrimination and to preserve those gains made by women and minorities in recent years.

The Women's Legal Defense Fund ("WLDF") is a non-profit, tax-exempt membership organization, founded in 1971 to provide pro bono legal assistance to women who have been discriminated against on the basis of sex. The Fund devotes a major portion of its resources to combatting sex discrimination in employment, through litigation of significant employment discrimination cases, operation of an employment discrimination counselling program, public education, and agency advocacy before the EEOC and other federal agencies that are charged with enforcement of equal opportunity laws. A major priority for WLDF is its Project for Women

of Color. In its pursuit of equality for both women and minorities, WLDF is committed to the use of affirmative action to achieve equal employment opportunity.